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LLOYD'S REPORTS OF PRIZE CASES.

Vol. II.





LLOYD'S REPORTS  
OF  
PRIZE CASES

DECIDED BY

THE RIGHT HONOURABLE  
SIR SAMUEL EVANS, P.C., G.C.B., LL.D.

*President of the Probate, Divorce, and Admiralty Division.*

AND ON APPEAL BY

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

DURING THE

EUROPEAN WAR

WHICH BEGAN IN AUGUST, 1914

REPRINTED FROM "LLOYD'S LIST" BY DIRECTION OF  
THE COMMITTEE OF LLOYD'S

AND EDITED BY

EDWARD LOUIS DE HART, M.A., LL.B.

*formerly Whewell International Law Scholar in the  
University of Cambridge, of the Inner Temple, Barrister-at-Law*

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VOL. II.

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1917





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v. 2

WILLIAM  
WINDHAM  
WINDHAM  
WINDHAM

## PREFACE.

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The Committee of Lloyd's and the Editor again desire to express their grateful acknowledgments to the Right Honourable Sir Samuel Evans, P.C., G.C.B., LL.D., President of the Probate, Divorce, and Admiralty Division, for the very kind interest which he has taken in this publication and for the care and valuable time he has devoted to the revision of the reports of his judgments.

They also desire to thank all those Counsel who have been so good as to revise the reports of their arguments.

E. L. d. H.

532952

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SIR THOMAS SALUSBURY.....	Dec. 1751	—	1773
SIR GEORGE HAY .....	Nov. 1773	—	1778
SIR JAMES MARRIOTT .....	Oct. 1778	-	1798
SIR WILLIAM SCOTT .....	Oct. 26, 1798	—	1828
(Created Baron Stowell, 1821)			
SIR CHRISTOPHER ROBINSON .....	Feb. 1828	-	1833
SIR JOHN NICHOLL.....	May, 1833	—	1838
RIGHT HON. STEPHEN LUSHINGTON	Oct. 1838	—	1867
RIGHT HON. SIR ROBERT JOSEPH			
PHILLIMORE	Aug. 1867	—	1875



# JUDGES OF THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION OF THE HIGH COURT OF JUSTICE FROM 1875.

---

As a result of the Judicature Act, 1873, the High Court of Admiralty was in 1875 merged in the Probate, Divorce, and Admiralty Division of the newly created High Court of Justice.

The Court of Appeal and the High Court of Justice together constitute the Supreme Court of Judicature.

By virtue of the Judicature Act, 1881, the President of the Probate, Divorce, and Admiralty Division is *ex officio* a judge of the Court of Appeal.

RIGHT HON. SIR JAMES HANNEN, President 1875 -- 1891  
(Appointed a Lord of Appeal, and created Lord Hannen, 1891)

RIGHT HON. SIR ROBERT JOSEPH  
PHILLIMORE, BART., P.C. .... 1875 -- 1883

RIGHT HON. SIR CHARLES PARKER BUTT,  
P.C. .... 1883 -- 1892  
(Appointed President, 1891)

RIGHT HON. SIR FRANCIS HENRY JEUNE,  
P.C., G.C.B. .... 1891 -- 1905  
(Appointed President, 1892; created Baron St. Helier, 1905)

RIGHT HON. SIR JOHN GORELL BARNES,  
P.C. .... 1892 -- 1909  
(Appointed President, 1905; created Baron Gorell, 1909)

SIR HENRY BARGRAVE DEANE ..... 1905 --

RIGHT HON. SIR JOHN CHARLES BIGHAM,  
P.C., President ..... 1909 -- 1910  
(Created Baron Mersey, 1910)

RIGHT HON. SIR SAMUEL THOMAS EVANS,  
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# LLOYD'S REPORTS

OF

## PRIZE CASES.

---

German Schooners

**"TOMMI."**

138 Tons.

(P. Neumann, *Master.*)

AND

**"ROTHERSAND."**

140 Tons.

(H. Neumann, *Master.*)

---

*Owners :* Norddeutsche Kraftfutter Ges.-m.b.H.,  
Hamburg.

---

This case is also reported

**[1914] P. 251.**

**84 L. J. P. 35.**

**112 L. T. 257.**

**59 S. J. 26.**

**31 T. L. R. 15.**

**1 Trehern, 16.**

---

*Enemy Ships—Flag—Transfer to neutral Flag while in transitu  
—Declaration of London, Arts. 55, 56, 57—Attitude of Prize  
Court to Municipal Law regarding passing of Property—Merchant  
Shipping Act, 1894, sects. 1, 7, 8, 9, 24—Company registered in  
England—Members all Enemy Subjects—Would Ship owned by  
such Company be considered British by Prize Court?*

The Prize Court in the circumstances refused to recognise a contract made on August 1, 1914, in contemplation of war between Germany and Russia, purporting to transfer two German vessels at sea to British ownership.

The *Jan Frederick* (1804), 5 Ch. Rob. 127; 1 E.P.C. 434; and the *Baltica* (1857), 11 Moo. P.C. 141; 2 E.P.C. 628 followed.



1914  
Oct. 12.

SCHOONERS  
" TOMMI " and  
" ROTHER-  
SAND."

—  
Before the  
Right Hon.  
Sir Samuel  
Evans,  
President of  
the Probate,  
Divorce, and  
Admiralty  
Division.

Mr. BUTLER ASPINALL, K.C., for the Crown : My Lord, the *Tommi*, a sailing vessel of 138 tons, arrived and was seized in the port of London on August 5. According to the certificate of measurement (one of the ship's papers) she was a vessel of German nationality, belonging, at the time in question, to the port of Hamburg, and sailing under the German flag. Under those circumstances there seemed to be little doubt that she was properly seized as a prize of war.

After the proceedings were instituted a claim was put in on behalf of the Sugar Fodder Co., Ltd., described as of Fleming's Wharf, West Ferry Road, Millwall, London. According to the notice of claim, it is a company incorporated by registration as an English company under the Companies (Consolidation) Act, 1908, and it claims the vessel on its own behalf as being " at all material times the true, lawful and sole owner of the said ship, her tackle and furniture." The document is signed " C. F. Gunther, Managing Director." That preceded certain correspondence between the Treasury Solicitor and Mr. W. R. J. Hickman, the solicitor acting on behalf of the alleged English company. The correspondence related not only to the ship in question, but also to the schooner *Rothersand*, the subject-matter of the next suit. The facts in both cases appear to be similar. In the second case the Crown is represented by Mr. A. D. Bateson, K.C., and Mr. Rayner Goddard. The first letter, dated August 24, was from Mr. R. M. Greenwood, " for the Treasury solicitor," to Mr. Hickman, solicitor for the claimants, as follows :

I have received your Appearance for the Sugar Fodder Co., Ltd., described by you as " Owners of the Ship *Tommi*." Is this correct? Or are your Clients merely Owners of the Cargo? The *Tommi*, from her papers, seems to be clearly a German-owned ship.

Mr. Hickman's answer was marked " without prejudice."

Mr. LAING, K.C. (for the Sugar Fodder Co., Ltd.), raised no objection to its being read.

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Mr. ASPINALL : The communication reads thus :

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In reply to your letter of yesterday, I called at your Office this afternoon, but you were not in.

With regard to the cargo, the Procurator having informed me that this would be released to my Clients, the Sugar Fodder Co., Ltd., there was no necessity for me to enter an Appearance in respect of this.

As to the ship, the Appearance is correctly entered by me as being on behalf of the Sugar Fodder Co., Ltd.

This Company, which is an English Company, entered into a binding contract on the 1st inst. [August] to purchase the ship, and has since paid the purchase money. I would therefore submit that, although according to the ship's papers the ship may be held to be a German-owned ship, it would not under the circumstances be equitable for the ship to be condemned and for my Clients to have to bear the loss of the purchase money paid by them.

My Lord, I doubt, for reasons furnished me, whether the statement that there was a binding contract and that the purchase money had been paid is correct. The grounds upon which the claim is based are apparently grounds of equity. The “ binding contract ” under which the English company said that it purchased the ship on August 1 was referred to in some correspondence produced by the company itself. The first communication is a telegram dated August, from some people signing themselves “ Nordkraft ” (a telegraphic name), who apparently on August 1 were the German owners of the vessel. It reads :

We sell you *Tommi* for 30,000 marks and *Rothersand* for 35,000 marks, wire acceptance.

The reply sent on the same day is as follows :

Accept sailing vessels for our account.—Sugar Fodder Co., Ltd.

That, I suppose, constituted the “ binding contract ” to which reference was made in the solicitor's letter. One



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point which I wish to make in opposition to the claim is that, according to English law, a ship can only be transferred by a bill of sale. [He referred to the provisions of Section 24 of the Merchant Shipping Act, 1894.] In view of the evidence I have before me, I think it is conclusive that the *Tommi* never was transferred by any legal formalities such as the English law requires, and that she was at the time of the alleged sale sailing under and enjoying the protection and privileges of the German flag.

The PRESIDENT : Where was the *Tommi* on August 1?

Mr. LAING : She sailed from Danzig early in July, and called at Cuxhaven on July 28. On the same day she left that port for Gravesend, where she arrived on August 5.

Mr. ASPINALL : Included in the bundle containing the telegrams I have just read there are two others, which may or may not turn out to be material upon the question of whether or not the sale of the two vessels was a *bona-fide* one. Having accepted the *Tommi* for M.30,000, equal to £1,500, and the *Rothersand* for M.35,000, or £1,750, on August 1, the Sugar Fodder Co., Ltd., made this offer to the British Admiralty :

Royal Admiralty.—We have just bought two sailing vessels fitted with tanks each to carry about 170 to 200 tons oil in bulk; one, named *Tommi*, is due in London, the other, named *Rothersand*, is due in Kirkcaldy. Both classified A1 Lloyd's. Would sell same at £6,000 each.—Sugar Fodder Co., Ltd. Communicate with F. Gunther, Granville House, Granville Park, Blackheath, S.E.

From that it would appear that the company was open to make a very handsome profit on the resale of the vessels, as having, as it alleged, bought the ships for £3,250, it was willing to part with them for £12,000. The reply of the Admiralty, if brief, was couched in courteous language :

Thanks for offer, vessels not required.—ADMIRALTY.

The file of the Sugar Fodder Co., Ltd., which is putting itself forward as the vendee of the vessels, shows that on September 15, 1914, Carl Fritz Gunther was its sole director. He also appears as one of the shareholders, with 151 shares. The remaining shareholders are Rudolph Schrader, of Hamburg, 150 shares; Julie Schrader, of Hamburg, 100 shares; Tilly Gunther, of London, 100 shares; and the Norddeutsche Kraftfutter Gesellschaft m.b.H., of Hamburg, 4,500 shares, out of a total of 5,001. Accordingly, the largest shareholder is a German company, of which " Nordkraft " is the telegraphic name. My short point is that the flag under which the *Tommi* was sailing determines her enemy character, and certainly there is nothing in the documents or correspondence which in any way negatives that. The German company is given in Lloyd's Register as the owner of both the *Tommi* and the *Rothersand*.

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The PRESIDENT : What was the name of the *Tommi's* master ?

Mr. ASPINALL : Neumann. I ask your Lordship to make an order for detention similar to that made in the leading case of the *Chile*.\*

At the request of his Lordship, Mr. GANDELL, formerly British Vice-Consul at Hamburg, entered the witness-box, and translated the bill of lading, which was in German. He explained that he left Hamburg on August 5, on the outbreak of hostilities between England and Germany. The cargo, said witness, consisted of liquid molasses, and the bill of lading showed that it was received into the holds of the *Tommi* from the German company for delivery to the Sugar Fodder Company in London, against payment of freight, the amount of which was not stated. The German

\* (1914), ante, Vol. I. 8, at page 48.



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company's name in English was the North German Force Feeding Co., Ltd.

The PRESIDENT : You were at Hamburg on August 1?

WITNESS : Yes.

The PRESIDENT : Was war declared between Germany and Russia at that time, Mr. Aspinall ?

Mr. ASPINALL : The ultimatum expired at midnight on August 1.

The PRESIDENT (to witness) : So far as you knew, in Hamburg on August 1 was war regarded as imminent ?

WITNESS : Not so far as England was concerned.

The PRESIDENT : War between any Powers ?

WITNESS : I think it was considered entirely probable. The merchants did not want it.

Mr. LAING, K.C. (on behalf of the Sugar Fodder Co., Ltd.) : My Lord, this is an English company. Carl Fritz Gunther, its director, was a German subject who came over to this country in 1912 to establish the English company. He was interested in the corresponding company in Germany. In May, 1912, the English company was formed and registered, and Mr. Gunther has resided in this country since then. Certainly up to the time of the war he had intended to reside here permanently.

A large mutual business was done between the German and English companies. The English company required treacle for the purposes of making its cattle fodder, and under those circumstances it was considered desirable, so far back as 1912, that it should own vessels with tanks to carry the treacle which came from the Baltic and other places. In 1912, the English company not having sufficient means, it was decided that the German concern should buy the vessels, and that the English company,

when it had sufficiently established itself, should take them over. According to Gunther, at the end of July it looked as if there would be war between Germany and Russia. There was no thought of England being embroiled at that time, and it was considered that the two vessels should be put under a neutral flag in order that they should be protected in their trade with the Baltic. Accordingly the telegram of August 1 was sent by the German house. The offer was accepted by Gunther, on behalf of the English company, and the bargain was closed.

At that time Gunther had advanced out of his own private funds over £4,000 to the German company, which sum was lying to his credit in Germany, and he wrote on August 1 a letter directing that the amount payable in respect of the two vessels should be debited against his account.

The English company credited Gunther in their books with the amount paid for the vessels, and so the transaction stood. I submit that on August 1 the transaction was completed, and that there was a good sale of the two vessels to the English company, which in law and in fact became the owners. The £4,000 was lent to the German company at interest. I submit that the transaction was a *bona-fide* one. I do not understand its being challenged. It was not entered into for the purpose of evading the consequences of war between Germany and England, but in order that the vessels might sail under the British flag—a neutral flag—in the event of war between Germany and Russia. I submit that the property in the vessels passed as soon as the transaction was completed, and they became British vessels as soon as they arrived in this country. The fact that they were under the German flag does not matter. The *Tommi* was not sailing under the German flag, but was lying in the Thames, and she was only waiting to be formally registered under the British flag.

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The section of the Merchant Shipping Act referred to by Mr. Aspinall deals only with British ships, and is not applicable. Therefore I submit that the vessels were British property at the time of seizure, and your Lordship ought not to condemn them as prize or order their detention.

*(Mr. Carl Fritz Gunther was then called as a witness.)*

In reply to the President Mr. ASPINALL said that, as the representative of the Crown, he had no objection to Gunther, a German subject, giving evidence.

WITNESS, in reply to Mr. Laing, said he was managing director of the English company, and resided at Blackheath. He came over to this country in May, 1912, to establish the English company, and he then made up his mind to reside in England permanently.

Mr. LAING : Have you altered your mind since ?

WITNESS : No, but it is hard to say what I shall do now, because I do not know whether the business will go on after the war.

Witness bore out Counsel's opening statement as to the reasons why the German company purchased the vessels, and added that at the end of July he wrote to the German company explaining that in the event of war it was desirable that the vessels should be transferred to a neutral flag. He wrote :

If your Sailing Vessels (in case of war) should be in this Country, we think it would be advisable if the Sugar Fodder Company bought same so that they may not be captured by any other nation.

That letter, said witness, was written on July 31, and the telegram from the German company was received the next day. He also wrote :

Should *Tommi* arrive here and war has broken out, we will take *Tommi*, as well as the *Rothersand*, over for our

account, but we are not quite certain whether the transaction will stand good, as both vessels are registered in Hamburg.

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The PRESIDENT : Did you mean war between England and Germany ?

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WITNESS : No, I never expected war between those countries.

Proceeding, Mr. LAING read a telegram to the captain of the *Rothersand*, informing him that the ship had been bought by the English company. On August 3 it appeared that the captain wired from Kirkcaldy to say the *Rothersand* had arrived there. Following this was a letter from Captain Neumann informing the English company that he had wired the German company, but had had no reply with regard to freight. Later there was a letter from the Sugar Fodder Company to Captain Neumann saying :

We are trying to get the *Rothersand* registered under the English flag as quickly as possible.

On August 22 it appeared that Mr. Schrader, manager of the German company, wrote from Hamburg to the Sugar Fodder Company in the following terms :

*Re Tommi and Othersand—*

I have not heard anything from you so far. The capturing cannot take place without reason, but rightness has to be decided by the Prize Court, and you will instruct your solicitor as to the purchase taking place before the war broke out, you paid the purchase price through debiting Mr. Gunther's account. The ships have become your property.

With regard to treacle there can be no doubt at all that same is your property.

Mr. LAING (*to the witness*) : On August 1, after the exchange of the telegrams offering the ships and buying them, what did you do to pay for them ?



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WITNESS : I wrote a letter to Hamburg and told them I would take the ships over, and asked them to debit my private account with the purchase-money, because I wanted my money over here, as I thought it was safer here than in Germany while Germany was at war with Russia.

Had you a credit with the German company at that time ?—Yes, the German company owed me about £4,000.

And did you purchase the cargo ?—Yes, the cargo was c.i.f.

So there was no freight to pay ?—No.

Mr. ASPINALL (cross-examining) : Do you tell his Lordship that what you had in your mind at that time was war with Russia ?

WITNESS : Yes, there were rumours about that Russia and Germany would go to war.

Had you any fears about France ?—Not so far. Of course we all knew that Russia and France had a treaty together, and there might be, but it was not certain.

Had you any fears about England ?—No.

Are you sure you did not consider the possibility of war with France and war with England ?—Not with England.

I suppose you keep books in connection with your business ?—Certainly.

And I suppose you are careful when you are dealing with these large sums to keep copies of correspondence which relates to these transactions ?—Under ordinary circumstances we always do.

Where does that piece of paper which shows that the German company owed you £4,000 come from ?—That was sent to my private house. It left Hamburg on July 8.

Do these figures find themselves in any books kept by you in this country ?—Yes, my private books.

*(These books were handed up, and witness said that he had kept them ever since he came to England in the summer of 1912.)*

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The PRESIDENT : What did the German company owe you money for ?—I advanced them money.

The PRESIDENT : Gold ?—Yes.

The PRESIDENT : Not an account ?—No.

Mr. ASPINALL : About the sale of these ships. Do you say you have bought them, or the English company ?—The English company has bought them, but I advanced the money.

Am I right in saying the English company had not the money ?—No, they would not have the money, and I advanced it because I wanted them under my own control.

Have you any documents which show that you have advanced money to the English company ?—Certainly.

The PRESIDENT : Are you sole director of the English company ?—Yes.

Mr. ASPINALL : Since when ?—Since September of this year.

Who were the directors before then ?—Mr. Schrader and myself.

Does Mr. Schrader live in England or Hamburg ?—Hamburg.

You say there is some entry which records this advance by you to the English company ?—Yes, the current account shows that I am credited with £3,250.

When it was arranged you should advance this money, did you write to the German company and say : " You owe me £4,000, and I propose to pay this by debiting that money with £3,250 " ?—I did not propose it. I instructed them to do it.

Have you kept a copy of that letter ?—No ; I wrote the



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letter in my private house on a Saturday afternoon, and I don't keep a copying press in my house.

As a man of business, if you had to do it again, don't you think you would keep a copy ?—In ordinary times I would not have written it myself. I would have dictated it and had it copied.

Writing it from your house, you would not have a copying book, but would it not have been equally important that you should have a copy ?—I ought to have done so, and would, had I known there was a chance of England and Germany being at war. I only thought there was a chance of war between Russia and Germany.

Did you get an answer to this letter ?—I only got the answer dated August 22. There are several letters after August 1 missing.

When you say these letters may have been lost, do you mean lost in the post or by you ?—Not by me.

The PRESIDENT : I thought all correspondence between Germany and this country ceased, and that it was impossible after the first week in August to get any letter from Germany here except, possibly, through the American Embassy. Did you get this direct from Hamburg ?—No.

The PRESIDENT : How did you get it ?—By Copenhagen.

Mr. ASPINALL : You say that other letters were lost, but how do you know that ? What I should have liked to see would have been a copy of a letter to the vendors and the answer by them, but neither is forthcoming.—If I had my copying book I might tell you which letters are missing.

But, at any rate, letters relating to the method by which the ships were to be bought are not to be seen ?—Except that of August 22.

That really does not help me.—If you give me time I can prove it.

If you have not any letter, how do you know you can prove it ?—Because their books in Germany will show it.

But you have not seen their books ?—I am certain they have had my letters, and that they have debited my account, so that I could prove it from their books.

If the ships had been sold as you say, were you desirous of putting them under the protection of the Admiralty, and did you at once offer to sell them to the Admiralty ?—Yes, I did.

For what purpose ?—I had been told the Admiralty might employ them as barges in London. If two countries go to war, you may be quite sure all the other Powers will protect themselves.

When you bought those ships from the German company did you think you gave a fair market price for them ?—They are cheap at the price I bought them at.

That is not quite an answer to my question. Did you think £1,500 for one and £1,750 for the other a fair price between a willing seller and a willing buyer ?—Yes.

On the same day when the alleged bargain was supposed to have taken place, you offered them to the Admiralty for £6,000 each ?—Yes.

Was that a fair price ?—I would have accepted part of it.

What do you say was the fair value of the ships when you offered them to the Admiralty ?—If I could have got £2,000 or £2,500 for each I would have sold them.

What do you think is the value of the ships to-day—£2,500 or thereabouts ?—Well, I will sell them for that to-day.

The PRESIDENT : Do you mean you would sell them for that if you knew they were yours, or that you would sell your chance of proprietorship ? If you knew they were yours what would you want ?—I would not sell them at all, because I want them for trading.

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Mr. ASPINALL : If you would not sell them at all, why was it that you offered them to the Admiralty ?—I understood the Admiralty wanted barges.

But you wanted them ?—If I could get a fair price I would sell them.

The PRESIDENT : What trade do you want them for ?—The carrying trade.

The PRESIDENT : From where to where ?—Now, I can only use them for trading round the coast—from here to the North of Scotland or Ireland.

Mr. ASPINALL : Assume the Admiralty had bought them, into whose pocket would the profit have gone—yours or your company's ?

WITNESS : Into my company's.

The PRESIDENT : Does the company pay a dividend ?—Yes.

Mr. BATESON, K.C. (on behalf of the Crown in the case of the *Rothersand*) : Have you produced every book and document you possess with regard to these transactions ?—I have.

You have no others ?—No.

Are all the shareholders in the English company Germans ?—They are.

The PRESIDENT : There was an English shareholder, apparently, who held one share at one time ?—At one time, yes.

The PRESIDENT : What became of it ?—I bought it.

The PRESIDENT : When ?—Two years ago.

Mr. LAING (re-examining) : I think that gentleman was one of those who gave a qualifying signature to the memorandum and articles of association. Now, with regard to

one or two matters on which you have been questioned. There were two letters written on August 1, one from the office and one from your private house ?—Yes.

The one from the office was acknowledged ?—Yes, on August 8.

When were the two letters posted ?—The one from the office at one o'clock, the one from my house about six.

So that one would naturally arrive before the other ?—Yes, by at least one day.

The PRESIDENT : There is the letter of August 1 mentioned in the letter from Hamburg on August 8. Was another letter written on the same day ?

Mr. LAING : Yes; the one from Mr. Gunther's house, which he says he has never had formally acknowledged, although the letter of August 22 mentions it. (*To the witness*) : My friend seems to think you asked too much for those boats from the Admiralty.

The PRESIDENT : It is only a profit of £8,750.

Mr. LAING : Except that you counted to make a good bargain, I don't see the point of the observation.

The PRESIDENT : I suppose there will be some question about whether the price was fair, and about *bona fides*. (*To witness*) : Mr. Rudolph Schrader lives in Hamburg, and is a German subject ?

WITNESS : Yes.

The PRESIDENT : And Julie Schrader, who is also on the register of the English company ?—That is his wife.

The PRESIDENT : There were two directors, you and he ?—Yes.

The PRESIDENT : You were the two directors on August 1 ?—Yes.

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The PRESIDENT : How came you to be sole director ?—  
Because then we had our board meeting, and we voted Mr.  
Schrader out.

The PRESIDENT : And were you voted sole director ?—  
Yes.

The PRESIDENT : Now the memorandum and articles of  
association have been handed to me, and they say, " The  
number of directors shall not be less than two nor more  
than four." Are you aware of that ?—Yes.

The PRESIDENT : So there must be two directors unless  
you change the articles ?—There was another gentleman  
coming on the board, but he declined to do so afterwards.

The PRESIDENT : Have you deposed Mr. Schrader ?—  
Yes.

The PRESIDENT : Then you have not got the necessary  
number of directors ?—Not so far.

The PRESIDENT : There were two directors on August 1  
when this transaction took place. Had you authority, as  
one of two directors, to act as the sole director ? With-  
out him, or even in spite of him, could you buy or sell  
ships ?—Yes, I could.

The PRESIDENT : Is Mr. Schrader a director of the  
German company ?—Yes.

The PRESIDENT : And you too ?—Yes.

The PRESIDENT : So that this company, although regis-  
tered here, is, to all intents and purposes, a German com-  
pany ? Its shareholders are all Germans ?—Yes.

The PRESIDENT : Are the shareholders the same in the  
two companies ?—No ; there are fewer in the Hamburg  
company.

The PRESIDENT : Who are the shareholders in the Hamburg company ?—Mr. Schrader and myself only.

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The PRESIDENT : What was the object in giving shares in the English company to Mrs. Schrader and your wife ?—To conform to the English law as to shareholdings.

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The PRESIDENT : Who attended the board meeting in England at which you removed Mr. Schrader, and constituted yourself sole director ?—Mrs. Gunther and myself.

The PRESIDENT : You were in the chair, I suppose ?—Yes.

The PRESIDENT : Who proposed that he should be removed ?—I did.

The PRESIDENT : Did Mrs. Gunther second the motion ?—Yes.

The PRESIDENT : And you put it to the meeting ?—Yes.

The PRESIDENT : It was carried unanimously ?—Yes.

The PRESIDENT : Did you indicate that to Mr. Schrader ?—I wrote to him. I don't know whether he received the letter.

The PRESIDENT : Who was the other person who was suggested to be a co-director of yours ?—Mr. Pinnock.

The PRESIDENT : Was a resolution appointing him duly carried at this same meeting ?—Yes.

The PRESIDENT : Is any qualification necessary for a director ?—Yes, 100 shares.

The PRESIDENT : Did he ever have any ?—No. That is why he did not come on the board.

The PRESIDENT : Did you offer to give them to him ?—He had to pay for them, and he would not pay.



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The PRESIDENT : When the shares of the company are sold, do they pass at par or less ?—Never less than par.

The PRESIDENT : Mr. Pinnock is a British subject ?—Yes.

Mr. LAING offered to call a witness to prove the books, but this was agreed to be unnecessary. He said he could also prove that the English company was a considerable concern with a substantial business.

The PRESIDENT : I don't know that that is disputed.

Mr. LAING : I thought there was some suggestion that this was not a *bona-fide* company.

Mr. ASPINALL : Not on my part.

The PRESIDENT : There may be a suggestion that this particular transaction is not *bona fide*, but nothing about the company.

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Mr. RICHARD SELLERS, an official in the Accountant-General's Department of the General Post Office, produced the originals of two telegrams. The first was handed in at Greenwich on the afternoon of August 1, addressed to Nordkraft (the telegraphic name of the German company) and read :

Accept sailing vessels for our account.—Sugar Fodder Co., Ltd.

Another telegram, dated August 3, from the company, and addressed to Neumann (who, Counsel explained, was the master of the *Rothersand*), ran :

*Rothersand* has been bought by us, Sugar Fodder Co., London, therefore communicate with us.

The PRESIDENT asked to see the first wire from Hamburg.

Mr. LAING : I have the original. It was received from the German company on August 1, and read :

We sell you *Tommi* for 30,000 marks and *Rothersand* for 35,000 marks, wire acceptance.—Nordkraft.

Mr. GUNTHER (recalled), in reply to Mr. Laing, said that when he told the Court last Monday about Mr. Rudolph Schrader, managing director of the German company, having been removed from the directorate of the English company, he forgot to mention a telegram received from Schrader on August 28, in which that gentleman resigned his directorship. It was after that that a resolution was passed removing him. The meeting was held on September 1 at the office of Mr. Hickman, the company's solicitor. Witness was in the chair, and his wife was also present.

Mr. BATESON (cross-examining) : You told me last time that you had produced everything connected with this matter that you had ?

WITNESS : Yes.

That was a mistake ?—Yes.

Was the *Rothersand* chartered outwards at the time you purchased her ?—Yes, from Falmouth to Kirkcaldy.

Was she chartered from Kirkcaldy ?—Not that I am aware of.

The PRESIDENT : Was she on her way to Kirkcaldy on August 1 ?

WITNESS : Yes.

Mr. BATESON : Was the *Rothersand* chartered to carry a cargo of coal to a port in Denmark ?

WITNESS : I cannot tell you, because I had not seen the captain. I only had a letter from him saying that coal could be obtained.

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The PRESIDENT : Had you given the captain any instructions ?

WITNESS : No, not so far.

Mr. BATESON : Do I understand that you bought this vessel not knowing whether she had any engagement or not ?

WITNESS : I did.

And you did not know of any charter to carry coal from Kirkcaldy ?—No.

You had never been told anything about her engagements at all ?—No.

Mr. BATESON handed to witness a document which he said purported to be a charter-party of the vessel by the firm of Hopkins as agents.

WITNESS said he knew nothing of the charter-party or of Hopkins.

Mr. BATESON said that the document was dated July 30. It contained a clause to the effect that should war be declared involving Great Britain, Germany, Denmark or the ship's flag, either party should be at liberty to cancel the contract.

WITNESS admitted that on August 3 the captain of the *Rothersand* wrote from Kirkcaldy that coal was to be had there.

Mr. BATESON : Will your Lordship look at the document ? It is only a copy.

The PRESIDENT : I should like to, but may I ? The witness does not admit it or identify it.

Mr. BATESON agreed that that was so.

Replying to Mr. Laing, witness said he had not seen the captain of the *Rothersand* since the outbreak of war. He was, witness understood, detained in a compound.

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The PRESIDENT called attention to a letter in which witness spoke of the right of the seller to cancel a certain contract in the event of a European war. Did not witness think at that time, asked his Lordship, that war was imminent with this country as well as between Germany and Russia ?

WITNESS : No, I never thought of war between England and Germany.

Mr. LAING : I have to satisfy your Lordship that this was a *bona-fide* sale and not a pretended sale—a *bona-fide* sale for payment made between a German subject and, for the purposes of the contract, a British subject, before the war broke out at all. The contract was made on August 1, and war broke out with this country on August 4, although hostilities with Russia commenced on the 1st.

According to the evidence of Mr. Gunther the vessels were purchased in 1912 by the German company on the invitation of the English company, in order that they might be used for the purposes of the English company's trade in treacle with the Baltic. Mr. Gunther stated that it was contemplated that at some time, when the finances of the English company would allow, the vessels should be transferred to the English company.

Towards the end of July last Gunther wrote to the German company stating that in the event of war and if the vessels were in this country, it was advisable that the English company should buy them so that they might not be captured by any other nation.

On August 1 Schrader sent the telegram offering to sell the ships, and on the same day Gunther wired accepting the offer. He allocated part of the £4,000 due to him to



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the payment of the vessels, and he was credited with the amount in the English company's books, so that payment was made. Was that done for the purpose of acquiring a property in the vessels, or was it done for the purpose of concealing the identity and nationality of the vessels for reasons adverse to the British Crown? The evidence shows that it was a *bona-fide* sale—a sale made for the purpose of protecting the vessels from being seized by Russia in the event of war between that country and Germany. It was contemplated at the time that the British flag would be a neutral flag. The documents which have been put in, I submit, constitute a *bona-fide* sale and transfer of property, and the property passed on August 1 upon the exchange of the two telegrams. I also submit that it was a good sale under the Sale of Goods Act, 1893, sects. 17, 18.

I agree that until the registration required by the British Merchant Shipping Act had been complied with, these two ships could not be navigated under the British flag. The Act provides that in order to register these vessels under the rules of the Merchant Shipping Act they are to be marked, an application for registration is to be made, a declaration of ownership has to be made, and the name of the master given.\*

The PRESIDENT: This company is no doubt an English company, but by our municipal law no alien can own any part of a British ship. Aliens can no doubt be shareholders in British companies, but supposing there was a company formed and registered, every shareholder of which was an alien, do you say that such a company is entitled to own a British ship?

Mr. LAING: Certainly; and I think the authorities say so.

\* See Merchant Shipping Act, 1894, ss. 7, 8, 9.

Mr. PRITCHARD (with Mr. Laing) : My suggestion is that according to British law a company is the creation of the law and has to be looked upon as a separate person, altogether apart from those who are in it.

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The PRESIDENT : You say it is a separate entity ?

Mr. PRITCHARD : The House of Lords says it is a separate entity (*Salomon v. Salomon & Co.* [1897] A.C. 22). It differs from a person because it arrives at maturity from birth, but it is to be looked upon as a person in law, and I submit that there are a considerable number of companies in this country which own ships——

The PRESIDENT : Companies composed of foreign shareholders ?

Mr. PRITCHARD : Yes, my Lord.

The PRESIDENT : Then such security as is supposed to follow on the provision of the Merchant Shipping Act disappears entirely ?

Mr. PRITCHARD : Your Lordship knows that a point which has been laid stress upon is that an English company is resident in England. The law has control of such a company and can determine if it is to the benefit of this country that such a state of things should be allowed to exist.

The PRESIDENT : How, from the way in which this purchase was made, would the English company benefit ?

Mr. LAING : By the debiting of the English company with the £3,250 for the purchase of the ships.

The PRESIDENT : The purchase made was paid for by the money of Mr. Gunther by a transaction which took place in Hamburg, and then, when Mr. Gunther began to deal with the Sugar Fodder Company, unless he received



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from the English company £3,250, he should have been credited and not debited with that amount.

Mr. LAING : It is debited to Mr. Gunther's account out there. If this was a *bona-fide* transaction, which I submit it was, what is the result of it ? The English company had got the vessels and Germany received the money before the war broke out. For the Court to deal adversely with these ships would be a great hardship on the English company. They had paid their money and had got their ships. I submit they ought to be protected. It is undoubtedly the fact that these vessels could not fly the British flag, but without using that flag they could be used for oil storing or something of that sort. It is asserted that the fact that a vessel is flying the enemy's flag is sufficient to fix her with enemy character, and that for that reason she should be subjected to disabilities. I contend, however, that there is a wide distinction between the capture of such a vessel at sea and the seizure of a vessel whose anchorage was within the territorial jurisdiction of Britain. Generally the nationality of a ship is determined by the residence of the owner in this country, and ought to be determined by the residence of the owner, notwithstanding the fact that she was entitled to fly the German flag if she wanted to, and not the British flag.

Mr. PRITCHARD : In the Prize Court, apart from anything special in the conduct of a vessel, its national character is determined by the commercial domicile of its owner, and the commercial domicile of this company was British. The purpose of seizing private property as prize is to decrease the enemy's resources or to punish hostile acts by neutrals or nationals. This purpose is in no way served by condemning these vessels, because by this transaction Great Britain gained two ships while Germany got only a book credit. Until August 4 it was not expected



in Germany that Great Britain would go to war (*Great Britain and the European Crisis*, p. 78), partly because Great Britain had not gone to war in 1864 to defend Denmark against Austria (Paul, *History of England*, vol. ii.).

Counsel for the Claimants also cited Westlake, *International Law*, Part II., *War*, pp. 141, 142; Hall, *International Law*, 6th ed., p. 491; Palmer on Company Law, 9th ed., p. 362.

Mr. ASPINALL (in reply) : The Prize Court in this class of case very properly requires clear and conclusive proof as to the *bona fides* of an alleged transaction such as this, and in this case such clear and conclusive proof is lacking. The transaction, so far as one has been able to get at it, seems to be at the best that Mr. Gunther had bought this property. According to the articles of association, the business of the company has to be done by two directors. But this transaction was entered into only by Mr. Gunther, and under those circumstances I submit that Mr. Gunther had no authority, even assuming he was desirous of doing so, for pledging the credit of the company. The whole matter was carried out by Mr. Gunther himself, and the money provided for the purchase was his money.

Then there was no record put in the books relating to the purchase and sale of these two ships except what has been referred to in the accounts of Mr. Gunther, and that is far short of the kind of record one would have expected in dealing with a businesslike transaction of that character.

The PRESIDENT : When was the purchase money to be paid ?

Mr. ASPINALL : I don't know.

The PRESIDENT : When was the completion to take place ?

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Mr. ASPINALL : I don't know. The thing lacks all the formalities one would expect. Here was a German ship, sailing under the German flag, purporting to be transferred to what was an English company, which for all practical purposes was concerned in the business and trade of the enemy, most of the shareholders being aliens and domiciled in a hostile country. Again, Mr. Gunther has told the Court that he had no apprehension at the time of the transaction of Great Britain being involved as a belligerent. But, as your Lordship has pointed out, a letter which has been read seems to favour the view that Mr. Gunther must have had such a contingency in his mind when he was buying these ships. Then there is the question of offering the ships to the British Admiralty. Why should he have thought that the Admiralty wanted such ships as these ? They are not the sort of ships the Admiralty would want in ordinary circumstances. That fact shows that Mr. Gunther had in his mind that war was likely to break out between England and Germany.

Then they have not been registered. I submit that the flag determines the enemy character of the *Tommi*, and the fact that it was seized at Gravesend, in British territorial waters, does not make any difference.

The PRESIDENT : Supposing it was a *bona-fide* transaction, and the transfer was sufficiently complete, what do you say about the purchase ?

Mr. ASPINALL : What I say is that the purchaser is Mr. Gunther, and he is not a naturalized Englishman. He is a German and an enemy.

The PRESIDENT : And as such you say that although his property on land is immune, any of his property at sea might be seized ?

Mr. ASPINALL : Yes. In a matter of this kind it is



necessary to look at the realities of the case. The object of the Merchant Shipping Act is that the British Government shall have control over ships, and that the owners should be such persons as would not use a ship in a way that would be prejudicial to the interests of the British Empire. I do not suggest that the Sugar Fodder Company would do anything of the sort, but it would be quite within their power to direct as to what purpose and how the ship should be used.

The PRESIDENT : Such a ship might be used to carry coal between this country and a foreign port ?

Mr. ASPINALL : Yes.

Mr. BATESON (in the case of the *Rothersand*) : My Lord, there has been no sale at all to an English company. The price mentioned was not a real price, but it happened to coincide with the limit of the money which Mr. Gunther had on the other side. Then the company could not pay, and the minute-book was entirely silent as to the transaction. There was no security on the part of Mr. Gunther, and he did not even know what the engagements of the ships were at the time he bought them. There is no document regarding their transference from the German to the English company, and no document of transference can come into existence so long as the war lasts. There was no power given to Mr. Gunther to buy for the company, and there is nothing to prevent the *Rothersand*, if your Lordship releases her, from going back to Germany under the German flag. The position would be that if she was captured on the other side she would be a German ship, and if captured on this side a British ship. She could carry her cargo between the two places without any interference at all. How can it be said that this ship would not be used in the interest of the enemy ?

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I invite your Lordship to make an order as in the *Chile*\* case.

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Mr. LAING (in reply) : The domicile of the owner determines the nationality of a vessel. The picturesque idea which has been put forward of a ship sailing under the German flag on the other side and the British flag on this side could not be acted upon in practice, because any ship would have to be registered before leaving this country.

He cited

The *Vigilantia* (1798), 1 Ch. Rob. 1 ; 1 E.P.C. 31.

The *Caroline* (1855), Spinks, 252 ; 2 E.P.C. 501.

The *Baltica* (1857), 11 Moo. P.C. 141 ; 2 E.P.C. 628.

The *Aina* (No. 1) (1854), Spinks, 8 ; 2 E.P.C. 247.

The *Belvidere* (1813), 1 Dods. 353 ; 2 E.P.C. 183.

### JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*) : I have made up my mind as to what I think the judgment of the Court ought to be, and, although, if I reserved my judgment, I should be able to put it in better form, I think there is no reason why I should not pronounce judgment at once.

The claim herein is made by a company registered in England, called the Sugar Fodder Co., Ltd., to the ownership of two vessels, one called the *Tommi*, and the other called the *Rothersand*, which have been seized in British ports. The *Tommi* was seized at Gravesend, and the *Rothersand* was seized in the port of Kirkcaldy. Both were seized after the outbreak of hostilities between this country and Germany, the date of the seizure being in

\* (1914), ante, Vol. I. 8, at page 48.

each case August 5. These ships belonged to a German company which is called the Norddeutsche Kraftfutter Gesellschaft, and some time in July these ships left German ports and were on August 1—which is an important date in this case—both of them on the high seas. It is said that the ships were sold *bona fide*, and that a sufficient transfer took place from the original owners to the alleged new owners, the Sugar Fodder Co., Ltd., when the ships were in transit.

The facts are simple, and I had better state them at once before I say anything about the law relating to the matter or about the *bona fides*, or the completion of the transaction, whatever it was. The first that the Court knows of any negotiation between the parties—because I cannot rely upon certain intentions said to have been held as to the transfer at some time or other of these ships from the German company to the English company—is what can be gleaned from the letter of July 31, 1914, written by the Sugar Fodder Co., Ltd., in this country, to the German company. The portion of the letter that refers to that matter is this :

If *Tommi* should not arrive in time we are going to land this 100 tons on our wharf, so that we make sure of this 100 tons should there be a European War, then of course there will be no chance whatsoever to ship any Gluten Feed, and of course all contracts would be cancelled.

We also try to take treacle in stock and hope that Tate will deliver already on the contract September-April.

Sailing Vessels. If your Sailing Vessels (in case of war) should be in this Country, we think it would be advisable if the Sugar Fodder Company bought same, so that they may not be captured by any other Nation.

I suppose that, in the ordinary course of things, would reach Hamburg on August 1. Now on August 1 another letter was written by the English company to the German

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company before the first telegrams were despatched. In that letter appears this phrase :

*Tommi*. We note that she left Cuxhaven on the 28th. Gluten Feed. There is no chance of buying Gluten Feed for forward positions, as there are no sellers on the market.

Monday is Bank Holiday in London, and if you should have anything to wire please wire to writer's private house.

Should *Tommi* arrive here and war has broken out, we will take *Tommi* as well as *Rothersand* over for our account, but we are not quite certain whether this transaction will stand good, as both vessels are registered in Hamburg.

If the judgment which I shall have to pronounce is right, Mr. Gunther showed a considerable knowledge of what the law was, or what the law was likely to be, in that last paragraph.

On the same day there was received by the English company, at an hour later than when that letter was written, this telegram from the German company to the English company :

We sell you *Tommi* for 30,000 marks and *Rothersand* for 35,000 marks; wire acceptance.—Nordkraft.

I do not know whether that is an offer to sell, or whether it is a direction from the directors over there to the directors over here, saying : " You must take it that this Company sells, whether you like it or not, and that your Company takes, the *Tommi* for 30,000 marks, and the *Rothersand* for 35,000 marks, and you must wire acceptance."

Whatever the proper reading of that telegram is, a telegram was sent on August 1 by Mr. Gunther, representing the English company :

Accept sailing vessels for our account.

Mr. Gunther also says that he wrote another letter on that



same day, August 1, from his own private house, a copy of which he did not keep, and the contents of which are not known to me.

On August 1 war began between Germany and Russia. The above transactions, whatever their effect may be, took place on that same day, and it is obvious, whether they took place after the hour when war was proclaimed, or before—I think, if I remember aright, there was a despatch from Germany to Russia sent at 10 minutes past seven on August 1, which culminated in a state of war—that, in any event, these transactions took place when war was imminent. I observe here that war was not declared between this country and Germany until August 4 at 11 o'clock at night, and that, therefore, at this time, August 1, this country was a neutral country. I have grave doubt myself as to whether there was not an apprehension in the mind of Mr. Gunther—I have graver doubt whether there was not an apprehension in the mind of Mr. Schrader, in Hamburg—as to the imminence of war between Germany and this country at that time. The letter which I have already referred to, and which Mr. Aspinall relies on, I think shows that there is room for the doubt which I have just expressed. However that may be, I do not think it is necessary, for the purpose of deciding this case, to show that they had the possibility of war between this country and Germany in their minds. The transfer which is alleged to have taken place was a transfer made in order to defeat the right of a belligerent. Russia, or any other belligerent, would have the right to capture that vessel at sea if she remained a German ship.

Now the question here is, whether or not such a transfer can be made so as to defeat the rights of belligerents at that time, because that is the test. And, if by reason of anything relating to the transfer it is void, the vessel remained the property of Germans, and when England

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became a belligerent she had the right to seize this vessel in a port as property belonging to subjects of a State then at war with her. There are three heads under which the case can be considered.

(1) The first is, that whatever may have been the result properly to be attributed to these transactions embodied in the alleged transfer, it is said the vessel was sailing under the German flag on August 5, and that, therefore, the German flag proves her nationality, and that she must therefore be taken to be a German, and subject to seizure by this country on August 5.

The law with regard to the carrying of the flag is perfectly clear, that if a ship does sail under a particular flag, unless there are very special exceptions, she enjoys the protection of the country whose flag she flies, and she is regarded as a ship belonging to the State whose flag she carries. Mr. Laing said there was a distinction to be drawn in considering this part of the case between a capture at sea and a seizure in port. It does not matter in the slightest degree whether the flag was actually flying, whether it was hoisted, or whether it was at the mast, when the ship was captured; the question is, what flag she was entitled to fly; and in my view there is no distinction in this respect between the case of a ship captured at sea, and the case of a ship seized in port. The law as it then stood, which says that the nationality of the ship depends upon the flag, was adopted in the Declaration of London. The parties agreed to the Declaration, and it must be remembered that it was stated at the commencement of the Declaration that the rules laid down are substantially in conformity with the Law of Nations as they now stand.

Article 57 of the Declaration of London says this :

Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly.



Not that which she is actually carrying, but that which she is entitled to fly. I will read the note of M. Renault to this Article, without pausing for the moment to consider whether it is binding. I will read it, as it expresses the view which I venture to entertain myself :

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The principle, therefore, is that *the neutral or enemy character* of a vessel is determined by the flag which she is entitled to fly. It is a simple rule which appears satisfactorily to meet the special case of ships, as distinguished from that of other movable property, and notably of the cargo. From more than one point of view, ships may be said to possess an individuality; notably they have a nationality, a national *character*. This attribute of nationality finds visible expression in the right to fly a flag; it has the effect of placing ships under the protection and control of the State to which they belong; it makes them amenable to the sovereignty and to the laws of that State, and liable to requisition, should the occasion arise. Here is the surest test of whether a vessel is really a unit in the merchant marine of a country, and here therefore the best test by which to decide whether her character is neutral or enemy. It is, moreover, preferable to rely exclusively upon this test, and to discard all considerations connected with the personal status of the owner.

The text makes use of the words, " the flag which the vessel is entitled to fly "; that expression means, of course, the flag under which, whether she is actually flying it or not, the vessel is entitled to sail according to the municipal laws which govern that right.\*

Now Mr. Laing admits that the flag she was entitled to fly at the time of the seizure was the German flag, and that she was not, and could not at any time during the war, even supposing the sale was valid, have the right to fly the British flag. Therefore, even if there was no other point in this case, I think the fact that this vessel was entitled to fly, and was flying, the German flag is enough to determine her German character, and she was properly seized in port on August 5 on behalf of the Crown as a *droit of Admiralty*.

\* See *Manual of Emergency Legislation*, p. 503.



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(2) The second head under which the case might be dealt with is the one which has been discussed at the Bar, as to whether this transfer was valid. I have come to the clear conclusion that for the purpose of the Prize Court this transfer was not a valid transfer at all. I cannot bring myself to believe that it was intended to be a *bona-fide* transfer of the ownership. It was hardly more than this—I am now summing up the transaction, because I will not go into the details: " We understand you over here, and you understand us over there; our Companies are intimately connected; we Germans own nine-tenths of the shares in the British Company; if war breaks out, whatever belligerent it is, let this ship be called a British ship."

I think that is the real substance of the transaction. Apart from that, much more is needed to transfer a vessel in transit when war has been declared, or even when war is imminent, than was done in this particular case. These matters have often been considered in the Prize Courts, and I will not refer to more than two cases on this question of the transfer of property when the ships are on the high seas. The one case deals generally with the principles, although it is a case which affects cargo and not the ship, and the second case, to which I will refer, is the one which affects the ship itself.

In the *Jan Frederick* (1804), which is reported in 5 Ch. Rob. 127, and 1 E.P.C. 434, Lord Stowell says this :

That a transfer may take place *in transitu* has, I have already observed, been decided in two or three cases, where there had been no actual war, nor any prospect of war, mixing itself with the transaction of the parties. But in time of war this is prohibited as a vicious contract; being a fraud on Belligerent rights, not only in the particular transaction, but in the great facility which it would necessarily introduce, of evading those rights beyond the possibility of detection. It is a road that in time of war must be shut up; for although honest men might be induced to travel it with very innocent intentions, the far greater pro-

portion of those who passed would use it only for sinister purposes, and with views of fraud on the rights of the Belligerent. This, however, is not a contract made in time of war; and therefore an important question is raised, whether the *contemplation of war* would have the same effect in vitiating these contracts as actual war? It cannot be said that all engagements in the proximity of war, into which the speculation of war might enter, as, for instance, with regard to the price, would therefore be invalid. The contemplation of war is undoubtedly to be taken in a more restricted sense: but if the contemplation of war leads immediately to the transfer, and becomes the foundation of a contract, that would not otherwise be entered into on the part of the seller, and this is known to be so done in the understanding of the purchaser, though on his part there may be other concurrent motives, as in the case of the *Rendsborg*,\* such a contract cannot be held good, on the same principle that applies to invalidate a transfer *in transitu* in time of actual war. The motive may indeed be difficult to be proved—but that will be the difficulty of particular cases. Supposing the fact to be established that it is a sale under an admitted necessity, arising from a certain expectation of war; that it is a sale of goods not in the possession of the seller, and in a state where they could not, during war, be legally transferred, on account of the fraud on Belligerent rights;—I cannot but think that the same fraud is committed against the Belligerent, not indeed as an actual Belligerent, but as one who was, in the clear expectation of both the contracting parties, likely to become a Belligerent, before the arrival of the property, which is made the subject of their agreement. The nature of both contracts is identically the same, being equally to protect the property from capture of war—not, indeed, in either case, from capture at the present moment when the contract is made, but from the danger of capture when it is likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis. In other words, both are done for the purpose of eluding a Belligerent right, either present or expected. Both contracts are framed with the same *animo fraudandi* and are, in my opinion, justly subject to the same rule.

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Now it is quite clear from the facts of this case, and

\* (1802) 4 Ch. Rob. 121.



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from what appears from the correspondence, that the origin of this transaction was a desire to defeat the rights of a belligerent when war, which was then imminent, became an actual fact, which it did a few days afterwards; and this passage from the judgment of Lord Stowell is as apt as it could possibly be to the circumstances of this particular case. In my judgment, it does not matter in the slightest degree that England was not a belligerent at that time.

The other case is the *Baltica*,\* where the subject-matter was not the goods, the cargo, but the ship itself. The actual decision in that case was that the ship had actually been delivered at a certain port, but the principles are fully dealt with by Lord Kingsdown in his judgment in that case :

The general rule is open to no doubt. A neutral, while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and the vendee, is good also against a captor, if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such a case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against captors, as long as the ship or goods remain *in transitu*.

With respect to these principles, their Lordships are not aware that it is possible to raise any controversy; they are the familiar rules of the English Prize Courts, established by all the authorities, and are collected and stated, principally from the decisions of Lord Stowell, by Mr. Justice Story, in his *Notes on the Principles and Practice of Prize Courts*, a work which has been selected by the British Government for the use of its naval officers, as the

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\* (1857) 11 Moo. P.C. 141; 2 E.P.C. 628.



best code of instruction in the prize law. The passages referred to are to be found in pages 63, 64 of that work.

The only question of law which can be raised in this case, is not whether a transfer of a ship or goods *in transitu* is ineffectual to change the property, as long as the state of *transitus* lasts, but how long that state continues, and when, and by what means, it is terminated.

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Then he discusses the grounds on which these principles have been based. He says :

There seem to be but two possible grounds of distinction. The one is, that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is, that the ship and goods having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent Powers, until the voyage is at an end.

The former, however, appears to be the true ground on which the rule rests. Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the Courts have laid down as a general rule that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure. It is true that, in one sense, the ship and goods may be said to be *in transitu* till they have reached their original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner.

It is admitted in this case, of course, that there was no delivery of the ship. The captain of the vessel did not know anything at all about the matter; apparently no instructions were received by him from the alleged purchaser in London until after the ship had been seized and the captain had been interned. I need not go into the exact details of this case. Nothing was arranged as to when the purchase money was to be paid, or as to when the completion

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was to take place. It is not shown that any satisfactory arrangement was made by the English company, that they and not the person who is said to have bought in the first instance—Mr. Gunther himself—should become the purchasers. When I read the Article from the Declaration of London dealing with the character of the vessel, which was to be determined by the flag she was entitled to carry, it was observed that the Article is subject to provisions respecting the transfer to another flag. I will refer very shortly to the two Articles dealing with the transfer of an enemy ship to a neutral flag; one dealing with the case before the outbreak of hostilities, and the other dealing with the transfer, if it is effected or attempted to be effected after the outbreak of hostilities.

Article 55 is as follows :

The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted.

Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

Article 56 is this :

The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it



is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

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There, however, is an absolute presumption that a transfer is void —

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(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If a right to repurchase or recover the vessel is reserved to the vendor.

(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled.

Apart from the Declaration of London, and its modified adoption, whatever alteration that may make in the Law of Nations, these artificial periods of time which were agreed upon by the various nations, namely, 30 days and 60 days, cannot be found in any decision of any particular Prize Court belonging to any country. They may be convenient rules. But I refer to these Articles merely as an illustration that the very basis of the principle is that the transfer was not made in order to avoid the consequences to which the enemy vessel might be exposed by the action of any belligerent, and the transfer must have been completed, not by letters and telegrams passing, with or without all the terms of purchase, but by formal documents necessary to complete the title being executed.

I have come to the conclusion without any doubt that this alleged transfer was not valid, and that, notwithstanding the transactions which took place between the two companies, or between the two directors, this ship remained, for all purposes connected with the Prize Court, a German ship. Inasmuch as Mr. Laing argued the point, I will just notice this in passing. Questions as to when property passes, which are often difficult to determine when dealing with the municipal laws of this country in our national courts, are not regarded in the same way when a Prize Court is determining the character



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of a vessel or the ownership of goods after war breaks out, or when it is imminent. It is quite clear in many cases that both ships, and cargoes on ships, where the property might very well be said to pass according to municipal law, would be the subject of capture at sea, according to the law of Prize Courts, and would be subject to seizure according to the same law if the vessels arrived in the ports of this country while this country is at war. These technicalities have not been allowed to bind the decisions of the Prize Courts. They are treated rather as gossamer, which can be brushed entirely aside; because the Prize Court regards the essential qualities of any transaction, and tries to arrive at the realities of a case.

(3) Now there is a third branch of this case which I will just mention, although I am not called upon to pronounce any decision upon it; for it must not be assumed, even supposing I was in favour of Mr. Laing on the first two points, that I should decide that this ship was immune from seizure. The two companies, the English and the German companies, were most intimately connected. The English company consisted of only five shareholders—one at this time was Mr. Rudolph Schrader, who was a director in Germany and who affected to sell this vessel to the English company, and his wife, and Mr. Gunther, in this country, who is admitted to be a German subject, and his wife. The fifth shareholder is the German company itself, the Norddeutsche Kraftfutter-Gesellschaft, and this company owns 4,500 out of 5,001 shares. There is not any English shareholder in the English company who is of British nationality. They are all citizens of the German Empire.

Now the policy of our municipal law is that no alien can own any share in a British ship. That is provided by the Act of 1894.\* It is no doubt the case that a company

\* Merchant Shipping Act, 1894, s. 1.

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registered in this country has, under the Companies Acts, a separate entity, and that such a company can own a ship. Whether a company consisting entirely of aliens can own a ship is a question which probably has never arisen, and it has, therefore, never been decided. I am not sitting here dealing with the municipal law to-day, and therefore I am not called upon to decide the point at all, but I do not want it to be assumed that the Prize Court could not say, looking at the reality of the thing, that, even if the transfer had been completed, and if these shareholders in the English company, or the English company in which they were shareholders, had become the purchasers, this vessel ought nevertheless to be regarded as a German vessel, under the circumstances. I am not deciding that question, but inasmuch as the matter has been discussed, I have thought fit to say as much as I have.

In the result I decide against the claim of the company, and I make an Order, as in the *Chile*,\* for the detention of this ship, and the *Rothersand*.

Mr. BATESON : In the *Rothersand* I have to ask for the freight to be paid into Court.

The PRESIDENT : Yes.

Mr. LAING : My friend has made an application about the freight. It strikes me that Mr. Gunther, or the English company, has got no freight in hand at all. I understood my friend said there was some freight in the hands of the Collector of Customs. Of course, if there is any, well and good.

The PRESIDENT : Yes, the freight has been received, and that freight has been paid into Court.

\* (1914), ante, Vol. I. 8, at page 48.

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Mr. LAING : My friend asked for that, but I do not know that there has been any payment in.

Mr. BATESON : No, my Lord, it is freight in the hands of the Collector.

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SAND."

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### COUNSEL

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#### IN THE CASE OF THE "TOMMI."

For the Crown	...	...	<i>Butler C. Aspinall, K.C.</i> <i>Rayner Goddard.</i>
For the Claimants	...	...	<i>F. N. R. Laing, K.C.</i> <i>Arthur Pritchard.</i>

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#### IN THE CASE OF THE "ROTHERSAND."

For the Crown	...	...	<i>A. D. Bateson, K.C.</i> <i>Rayner Goddard.</i>
For the Claimants	...	..	<i>F. N. R. Laing, K.C.</i> <i>Arthur Pritchard.</i>

### SOLICITORS

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For the Crown	...	...	<i>The Treasury Solicitor</i> <i>for the Procurator-General.</i>
For the Claimants	...	...	<i>W. R. J. Hickman.</i>



German Lugger

“BERLIN.”

79 Tons Gross (110 Metric Tons).

(W. HEINE, *Master.*)

*Owners :* Emden Heringsfischerei Akt.-Ges., Emden.

This case is also reported

[1914] P. 265.

31 T. L. R. 38.

84 L. J. P. 42.

1 Trehern, 29.

59 S. J. 59.

*Fishing Vessel 100 Miles from Land—Coast Fishery—Hague Convention of 1907, No. 11, c. 2, Art. 3—All Belligerents not Parties to the Convention—Montenegro and Servia not Parties—Law independent of Convention—Evidence—Strict Rules of ordinary Courts not binding on Prize Court—Ship's Log—Confidential Documents as Evidence.*

*Held* that a German fishing vessel of 110 tons measurement, which was captured while engaged in herring fishing, about 100 miles from the Scottish coast and 500 miles from the nearest German port, was not a vessel employed in coast fishery, and was liable to condemnation whether or not German citizens could claim the benefit of The Hague Convention of 1907, No. 11.

MR. ARTHUR PRITCHARD : If your Lordship pleases, this is the case of a German fishing vessel, which was seized as a prize by H.M.S. *Princess Royal*.

It appears from the ship's papers that she is a fishing lugger belonging to the port of Emden, of 110 metric tons. She had a crew of 15 hands, and one boat, and was carrying at the time 350 empty barrels, 100 barrels of salt, and 50 barrels of cured herrings; and she belonged to the Emden Herring Fishery Company, of Emden.

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—  
Before the  
Right. Hon.  
Sir Samuel  
Evans,  
President of  
the Probate,  
Divorce, and  
Admiralty  
Division.

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The PRESIDENT : Where was she seized ?

Mr. PRITCHARD : The s.s. *Ailsa* was 95 miles E.S.E. of Wick when she was commanded by one of His Majesty's ships to take this vessel, the *Berlin*, into port. The seizure was by the *Princess Royal*, but the mate only knew that he was told by one of His Majesty's ships to take this vessel into port, and he brought her into port. Of course, there is a provision in The Hague Conventions with reference to fishing vessels, and that is contained in Convention 11, Chap. 2, Article 3, and the official translation says this :

Vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture, together with their appliances, rigging, tackle, and cargo.

This exemption ceases as soon as they take any part whatever in hostilities.

The Contracting Powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance.

I am told with reference to the first paragraph that a better translation would be "exclusively destined for" rather than "employed exclusively in." My position on that point is that this vessel was undoubtedly captured somewhere about the place where she was sent in by the *Ailsa*.

The PRESIDENT : What was that position ?

Mr. PRITCHARD : 95 miles east south east of Wick, in the north of Scotland. She was captured somewhere about there, undoubtedly, and one of two things results : Either she was fishing there, or she was not. If she was fishing there, then she cannot be said to be exclusively destined for coast fishing, because it would be somewhere about 500 miles from her own port of Emden. If, on the other hand, she was not employed in fishing, what was she doing



there? Then I should submit that the presumption was that she was not there—not very far off the port of Aberdeen—for innocent purposes; and in that case she comes under Paragraph 2 of the Article.

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The PRESIDENT: What evidence do you say there is of her having taken part in hostilities?

Mr. PRITCHARD: All I say is, if she was in that place she must have either been engaged in fishing or doing something else. If she was not engaged in fishing, I am submitting that there is a strong presumption that she would not be where she was for innocent purposes; she must have been there for some other purpose, because she would not have been there for her own purposes. One cannot imagine any innocent purpose that a German fishing vessel would be serving off the coast of Aberdeen at that time.

The PRESIDENT: What was the date of the capture?

Mr. PRITCHARD: August 27 is the date of the affidavit, which says it was at 6.30 a.m. on August 6.

The PRESIDENT: That is not long after the outbreak of war?

Mr. PRITCHARD: No, one day after.

The PRESIDENT: I see that from Wick to Aberdeen is about 97 miles, and if she was about east south east of Wick, this vessel must have been very near Aberdeen?

Mr. PRITCHARD: Yes, I have marked it on the chart.

The PRESIDENT: Is there a fishing ground there, or not?

Mr. PRITCHARD: No, I do not think there is a fishing ground; it seems to me well above the Dogger Bank. I have



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marked a pencil cross just by the compass there (*handing up the chart*). I have marked 95 miles east south east of Wick.

The PRESIDENT : Yes, Aberdeen is more south east than east south east. She is well away from the fishing ground.

Mr. PRITCHARD : Yes, and she had only cured herrings on board ; she had not any fresh fish on board. If she had got fresh fish it might have been another matter, but I submit that if she was fishing up there, which perhaps might be a probability, then she could not be said to be exclusively destined for coast fishing. It may be doubted, perhaps, precisely what that means, but I should have thought coast fishing meant fishing in territorial waters, and that is the highest it could be put.

The PRESIDENT : Not necessarily fishing in territorial waters ?

Mr. PRITCHARD : Or adjacent thereto.

The PRESIDENT : Fishing along the coast to which the vessel belonged ?

Mr. PRITCHARD : Yes, my Lord, but I should have thought the intention was that vessels fishing quite close to the actual land of their country should be exempted. It could not be intended that vessels should go away right on the high seas, 500 miles from their port ; and I submit, therefore, that this vessel does not come within the position of being exclusively destined for coast fishing. And, besides, there is this to be said. It is herring fishing—the company is a herring fishing company—the boat is evidently intended for herring fishing, and I submit there are no herrings on this coast.

The PRESIDENT : Do they not catch herrings on the coast ?

Mr. PRITCHARD : They do not catch them mainly on the coast, I understand, but further away. Herring fishing, I should say, is not what you would call coast fishing.

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The PRESIDENT : I know that in a part of my own country there is herring fishing, round the coast of Cardiganshire.

Mr. PRITCHARD : What I mean is, that such vessels do not strictly confine themselves to coast fishing. After all, it is a very strict expression, “coast fishing,” and I submit that coast fishing does not carry you ordinarily beyond the territorial waters, namely, three miles.

The PRESIDENT : What distance was it from its port, did you say ?

Mr. PRITCHARD : About 500 miles.

The PRESIDENT : And what distance from the nearest port in Germany ?

Mr. PRITCHARD : I should think Emden would be about the nearest port in Germany. It would be a long way, of course, from the Scottish coast. I submit she was not exclusively employed in coast fishing, being employed in this herring trade, and that she would not come properly to this part of the world.

The PRESIDENT : Where is your evidence in support of your statement ?

Mr. PRITCHARD : It is the statement of the mate of the *Ailsa* ; it is referred to in the affidavit by John William Davidson, Surveyor and Chief Officer of Customs at Wick, who being solemnly sworn, depones that

. . . at 6.30 a.m. on the 6th day of August, 1914, the mate of the s.s. *Ailsa*, of Leith, official number 87,613, Owner, John Thomas Salvesen, 28, Bernard Street, Leith, sent for me to my house. I came to my office at the



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Custom House, when the said mate told me that when the s.s. *Ailsa* was from 90 to 95 miles E.S.E. of Wick, they were commanded by one of His Majesty's ships to take the German fishing vessel *Berlin*, of Emden, A E 18, into port, and that in accordance with this command the s.s. *Ailsa* had brought the *Berlin* into Wick Harbour.

The mate of the *Ailsa* also informed me that the *Berlin* had been taken as a naval prize by H.M.S. *Princess Royal*, and he asked me to take possession of the vessel, as the Chief Officer of Customs at Wick, which I did.

The mate of the *Ailsa* did not inform me where the capture was effected. He simply told me that it was from 90 to 95 miles E.S.E. of Wick that he was ordered to take charge of the vessel. No ship's papers were handed over to me by the mate of the *Ailsa*.

I thereafter took charge of the *Berlin*, and placed James Paterson Davidson, Preventive Man, Customs, Wick, on board.

I was in error in saying that the *Ailsa* fell in with His Majesty's ship at 6.30 a.m.; it was 6.30 a.m. when the mate of the *Ailsa* sent for the Chief Officer of Customs at Wick. And he then goes on to say how he dealt with the vessel, and applied for the papers.

The PRESIDENT: Why did you not obtain an affidavit from the mate?

Mr. PRITCHARD: I suppose the mate was in a hurry to get away.

The PRESIDENT: It does not take long to get an affidavit.

Mr. PRITCHARD: No, it certainly would have been desirable; it should have been done, but he does not seem to have done so.

The PRESIDENT: There is no direct evidence as to where this vessel was taken.

Mr. PRITCHARD: It would rather appear that if the vessel was taken anywhere on the south coast she would not be ordered to be taken into the port of Wick.



The PRESIDENT : I do not know—she might have been right over on the opposite side, and the port of Wick might have been the nearest British port to take her to.

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Mr. PRITCHARD : Yes, that is so, my Lord.

The PRESIDENT : Where is the *Ailsa* now ?

Mr. PRITCHARD : I have no instructions about it ; I do not suppose it is known. No doubt, further evidence could be obtained, if necessary.

The PRESIDENT : Do the Prize Court Rules allow me to accept as evidence what cannot by the ordinary rules of law be regarded as strict evidence ?

Mr. PRITCHARD : I cannot go as far as that, but they certainly allow your Lordship to make any legal presumption, and I should have thought there was a presumption of law here.

The PRESIDENT : What presumption ? I am ready to make any reasonable presumption.

Mr. PRITCHARD : The presumption is that she was captured somewhere in the North Sea—to the north of the North Sea and not to the south—and that she was fishing, or was bound for fishing, just about here on August 6—very likely she did not know anything about the war. In those circumstances she was certainly not exclusively destined for coast fishing, and therefore she did not come within Article 3 of Chapter 2 of Convention No. 11 ; and, unless she can bring herself within that Article, she has no defence, and there is no question at all that she is a prize. No doubt, she could not have been seized as a prize before 11 p.m. of the 4th, and she probably was not towed very far.

The PRESIDENT : What time on the 6th was she captured ?

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Mr. PRITCHARD : Well, the mate of the *Ailsa* comes in on the morning of the 6th—at 6.30 a.m. on the 6th.

The PRESIDENT : That would be 31 hours ?

Mr. PRITCHARD : Yes.

The PRESIDENT : Well, I do not know anything about the speed of the *Ailsa*. She towed her in, I suppose ?

Mr. PRITCHARD : I believe so ; he was told to take charge and take her in.

The PRESIDENT : They had some nets on board ?

Mr. PRITCHARD : Yes, two drift nets and two bush ropes.

The PRESIDENT : Is there any difficulty in obtaining the evidence from the *Ailsa* ?

Mr. PRITCHARD : I have not any instructions at present ; it appears to be quite uncertain where the *Ailsa* is. This being on August 6, I should think in all probability she was coming away at the time, and it would only be a matter of delay.

The PRESIDENT : Where is the *Berlin* now ?

Mr. PRITCHARD : At Wick.

The PRESIDENT : Is she causing any inconvenience there ?

Mr. PRITCHARD : Not as far as I know, but she is taking up room. The harbour is wanted, no doubt, and it is desirable to get rid of her. I do submit she cannot be said to be exclusively employed in coast fishing.

The PRESIDENT : I cannot say what she was employed in except fishing. Is there anything to show that it was not coast fishing ?

Mr. PRITCHARD : I should think certainly there is nothing in the circumstances to show that she was employed in coast fishing. She was a long way off the coast of Germany.

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The PRESIDENT : I do not know how long it takes to get across from Emden up towards Wick ; I daresay I shall be able to draw the inference in your favour at some time or another, but if other evidence can be got, it had better be obtained.

Mr. PRITCHARD : She was some distance away.

The PRESIDENT : I thought she was towed in by the steamer ?

Mr. PRITCHARD : She was brought into Wick by the steamer, but she appears to have been seized in the north of the North Sea.

The PRESIDENT : That is my difficulty. How do you know that ? Because the mate told somebody else ?

Mr. PRITCHARD : I am suggesting there is a strong presumption that, as she was captured by His Majesty's ship, if she was captured in the south of the North Sea, she would not have been ordered to be taken into Wick.

The PRESIDENT : Under what part of the Rules do you say that I can draw the presumption in your favour ? Do you say that I could, in the Admiralty Court, where evidence is strictly taken, find that this vessel was captured 95 miles E.S.E. of Wick ?

Mr. PRITCHARD : I think your Lordship might draw that presumption. There is no other evidence.

The PRESIDENT : I suppose I might draw it, but am I justified in drawing it ?



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Mr. PRITCHARD : Order XV., Rule 2, says :

A cause for the condemnation of a ship other than a ship of war shall be heard upon the following evidence, namely :

(a) the affidavit as to ship papers, and the ship papers, if any, exhibited thereto ;

(b) upon the affidavits of the officers of the ship concerned in the capture ;

(c) the depositions of the witnesses, if any, examined before the hearing, whether such witnesses belong to the captured ship or are tendered on behalf of the captors or of any other party ;

(d) the evidence given at the hearing of any witnesses, whether on behalf of the captors or of any other party ; and

(e) such further evidence, if any, as may be admitted by the Judge.

I should submit that the Court could draw the presumption.

The PRESIDENT : The Rule says "such further evidence," not "such further second-hand evidence" ; if the evidence is available I think I ought to have it. The affidavit ought to have been made at the time, and if the evidence is available it ought to be forthcoming, because it is the very essence of this case to know what part of the water this ship was in. I do not cast any doubt at all upon the conversation, and it may be, if there was no other evidence in your favour, that I should draw a presumption after this lapse of time, but I think further evidence should be forthcoming if possible.

Mr. PRITCHARD : Your Lordship thinks evidence ought to be forthcoming from the *Ailsa*.

The PRESIDENT : An affidavit made by anybody on the *Ailsa*.

Mr. PRITCHARD : Or on H.M.S. *Princess Royal*.

The PRESIDENT : Yes, evidence to say whereabouts she was captured. Where are the crew ?

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Mr. PRITCHARD : That, my Lord, I have no information about ; I presume they would be let go free.

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The PRESIDENT : You could have taken a statement from the captain of the *Berlin*. In the old days, under the " Standing Interrogatories," his evidence would have been taken.

Mr. PRITCHARD : Your Lordship said some further particulars should be given of the place where the *Berlin* was at the time of seizure. Since then the log of the *Berlin* has been translated, and from the log the place appears sufficiently.

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*(A copy of the log was handed up to his Lordship.)*

Your Lordship sees the log runs from July 27 ; the top figures on the left-hand side are 27 and 28, and it runs down from July 27 to the last figures, which are 4-5. The 4-5 is under August, and the latitude during the first few days is about 55 deg. N., but from July 31 up to August 4-5 the latitudes are from 55 deg. to 58 deg. N., and the longitudes from 0 deg. 58 min. to 0 deg. 33 min. E. I have marked these on the chart.

The PRESIDENT : The important days are the 3rd to the 4th, and the 4th to the 5th.

Mr. PRITCHARD : Yes ; I have marked her fishing from that date ; your Lordship will see there is a cross under the date of the 4th right at the top, and then there are other crosses given. *(Handing up the chart.)* That top cross of the chart represents her position as shown by her own log on the 4th, and then there are lower crosses lower down, the 3rd and down to the 31st. From that it appears that during the whole time she was keeping right out to sea, 70 to 100 miles out from the coast.



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The PRESIDENT : From her own coast ?

Mr. PRITCHARD : No, from the Scottish coast.

The PRESIDENT : That is the coast we have to look at, is it not ?

Mr. PRITCHARD : There is authority for saying that Article 3 of Convention 11 might either mean the coast of her own country or of another. I thought the suggestion perhaps might be that she was fishing off the coast of Germany ; but if it is that she was fishing off the Scottish coast, which is the most favourable construction for her, the depths of the waters are from 40 to 80 fathoms, and show she was not off the Scottish coast. There has been a difficulty here in getting further evidence ; it is impossible to get an affidavit from the master of the *Ailsa*. I am instructed she has left the country. It appears that the Admiralty, from certain confidential documents which they are unable to produce, know that the time of capture was 11.30 a.m. on August 5, which shows that at that time the vessel was far out at sea. My submission is that, having regard to where she had been fishing for all these previous days, it cannot be said that under Article 3 of Convention 11 she is exclusively employed in coast fishing. I think that perhaps the best authority for the meaning of " coast fishery " in the present circumstances is the definition of the coast of Scotland for herring fishing purposes in the Herring Fishery (Scotland) Act of 1867.\*

I cited the Eleventh Hague Convention of 1907, Chapter 2, Article 3, to your Lordship on the last occasion. The official translation is :

Vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture, together with their appliances, rigging, tackle, and cargo.

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\* 30 & 31 Vict. c. 52, s. 11: "The Words 'the Coasts of Scotland' shall mean and include all Bays, Estuaries, Arms of the Sea, and all Tidal Waters within the Distance of Three Miles from the Mainland or adjacent Islands."



The PRESIDENT : Very well. Then we come up against Article 9 of the same Convention. All the belligerents are not parties to the Convention. Montenegro and Servia are not. It may be that, in strictness, The Hague Convention is not applicable. There is every desire in this Court to give application to The Hague Convention where it possibly can ; but I would rather have the case argued on the old law.

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Mr. PRITCHARD : If your Lordship pleases. Then, on the old law, all the cases bearing on the subject are, I think, exhausted in the United States case of the *Paquete Habana* and the *Lola* in 1899. It is the first case referred to in Pitt Cobbett's *Leading Cases*, and it is reported in 175 United States Reports, at page 677. That was a decision that a coast fishing vessel was not the subject of capture. That was, of course, before The Hague Convention, but it is part of the substance of the decision that it applies to coast fishing vessels.

The PRESIDENT : Does that case throw any light upon what coast it is ?

Mr. PRITCHARD : That was with reference to two vessels of small tonnage which were found fishing off the coast of Cuba, and the Court relied there upon their having live fish. Here, this vessel was carrying barrels for the purpose of salting down herrings ; she had a considerable number of barrels of salt, and her object clearly was to fish for herrings and then salt them down ; therefore upon that ground it clearly does not come within the doctrine of a coast fishing vessel. That is stated very clearly in *Westlake*. I submit the doctrine is as put in the United States case ; that is, that it applies only to coast fishing vessels, and this turns partly on the questions whether the vessel was carrying live fish or bringing in live fish.

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The PRESIDENT : But supposing she had live fish ?

Mr. PRITCHARD : Well, she is fishing with the object of catching fish, and bringing them in alive, but this vessel does not come within that definition.

The PRESIDENT : Why do you say she was not doing so ?

Mr. PRITCHARD : Because she was carrying fish which was salted—she had barrels of salt on board.

The PRESIDENT : That might be for the food of the crew. She had nets for the purpose of catching fish ?

Mr. PRITCHARD : I expect she was there for the purpose of catching herrings and salting them down.

The PRESIDENT : It does not matter what she does, if she is a fishing vessel on the coast.

Mr. PRITCHARD : She is a fishing vessel 70 to 100 miles from the coast, and she is not fishing on the coast, and she is still less a coast fishing vessel because she does not deal in live fish, but salt fish.

The PRESIDENT : I do not understand why. She had not caught any live fish, perhaps.

Mr. PRITCHARD : Well, it says in the log she had ; under the date of July 27 and 28, she had caught three maunds of herrings, and then under the date of August 2 and 3 she caught two maunds, and there are other entries.

The PRESIDENT : How many fish does a maund hold ?

Mr. PRITCHARD : It is a great big wicker thing containing, I should think, hundreds and thousands of fish.

The PRESIDENT : Why should they not salt them on board for food ?



Mr. PRITCHARD : It might be so, but if she was fishing in 40 to 80 fathoms, 70 to 100 miles from the coast, catching herrings and salting them down, she would not come, I submit, within the definition of vessels engaged exclusively in coast fishing.

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The PRESIDENT : Well, I do not follow your argument, I am sorry to say. Does she not fish on the coast because when she catches the fish she salts them ? I do not understand your suggestion.

Mr. PRITCHARD : Well, on that theory she does not, if coast fishing means, as Westlake and other authorities say it does, vessels that go out simply to catch fish alive and bring them home alive. Of course, there must be some distinction between vessels coast fishing and vessels deep sea fishing, and it appears in Hall's *International Law* (6th ed., p. 447) that vessels engaged in deep sea fishing are not exempt from capture. Then again in Westlake (*International Law*, Part II., War, p. 157) a distinction is drawn between fishing on the coast and deep sea fishing, and what he says there is that in coast fishing fish must be brought in alive, and that appears to constitute the necessary distinction.

Then there is the argument of the chief German authority on the subject, Holtzendorff, which I might refer to ; I have got the German and English here, and he says that vessels that are engaged in deep sea fishing are liable to capture as if they were traders.

The PRESIDENT : Where is that from ?

Mr. PRITCHARD : It is from the 4th volume of Holtzendorff's handbook.\* Then there is the case of the *Young Jacob* and *Johanna* (1798, 1 Ch. Rob. 20), where the vessel

\* Holtzendorff, *Handbuch des Völkerrechts*, Vol. IV., page 585.



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was condemned by Sir William Scott. It is referred to in the United States case. The headnote is this :

Forbearance towards common fishing boats has been a matter of comity in former wars. In this they have been proceeded against and condemned.

And he condemns the vessel in that case. My submission is that the only possible way in which the *Berlin* could escape would be to show that she was exclusively engaged in coast fishing, and there is very strong ground here for holding that she was not so exclusively engaged.

The PRESIDENT : A steam trawler, was it ?

Mr. PRITCHARD : A fishing lugger; she was a sailing vessel; she carried steam for two boilers, and the necessary nets.

The PRESIDENT : When did she reach Wick ?

Mr. PRITCHARD : She was brought into Wick on August 6, and she was captured about 11.30 a.m. on August 5. That appears from the confidential document from the Admiralty. I hope your Lordship will accept that.

The PRESIDENT : By whom do you say she was captured ?

Mr. PRITCHARD : She was captured by the *Princess Royal*.

The PRESIDENT : And handed over to the *Ailsa* ?

Mr. PRITCHARD : Yes, my Lord.

The PRESIDENT : Now give me the facts you have got about the capture.

Mr. PRITCHARD : The evidence is the affidavit of Mr. Davidson, who was the Chief Officer of Customs at Wick.

He says that at 6.30 a.m. on August 6 the mate of the *Ailsa* sent for him to his house.

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I came to my office at the Custom House when the said mate told me that when the s.s. *Ailsa* was from 90 to 95 miles E.S.E. of Wick, they were commanded by one of His Majesty's ships to take the German fishing vessel *Berlin*, of Emden (A E 18) into port, and that, in accordance with this command, the s.s. *Ailsa* had brought the *Berlin* into Wick Harbour.

The PRESIDENT : That is to say, when she was given up by the *Princess Royal* to the *Ailsa* ?

Mr. PRITCHARD : That is what he says. He goes on to say :

The mate of the *Ailsa* also informed me that the *Berlin* had been taken as a naval prize by H.M.S. *Princess Royal*.

He does not in terms say that she was not handed over by the *Princess Royal*, but by some other vessel, but one rather assumes it.

The PRESIDENT : Does he say what time she was handed over ?

Mr. PRITCHARD : He does not give the time, but simply says 90 to 95 miles E.S.E. of Wick.

The PRESIDENT : Do you make any point about the size of the vessel, that the Rule is only meant for small coasting vessels ?

Mr. PRITCHARD : Yes, 110 tons is rather a big size for any fishing vessel. She has a steam capstan and two drifts of nets—it may be miles of nets. On that ground she is not the sort of thing to be called a coast vessel.

The PRESIDENT : Do you say there may be miles of nets ?

Mr. PRITCHARD : There may be. I do not know what

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a drift is, but I am told they do carry them sometimes three-quarters of a mile long.

The PRESIDENT : And you say that points to deep sea fishing, and not coast fishing ?

Mr. PRITCHARD : Yes, I do, and I rely specially on the salt. Therefore, she does not come within what most authorities have considered as the distinction between a deep sea fishing vessel and a coast fishing vessel. She is clearly not a coast fishing vessel, and certainly not exclusively so.

The PRESIDENT : I am much obliged to you for your argument. As this is the first case of the kind, and an industry is affected, I will consider the matter, and give my judgment on Thursday. These Prize Courts are not governed by the same rules of evidence as other Courts in this country ; there is no reason why I should not look at the confidential document, I suppose ?

Mr. PRITCHARD : None whatever, except that I have not got it. Your Lordship knows how these confidential documents are obtained in such circumstances.

The PRESIDENT : Has the Solicitor to the Treasury got it ?

*(The document was handed up to his Lordship, who, after looking at it, returned it.)*

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The PRESIDENT (*The Right Hon. Sir Samuel Evans*) : The Crown, in this case, asks for the condemnation of the sailing ship, the *Berlin*, and her cargo, as being enemy property. No claim has been made in respect thereof. It



is, nevertheless, necessary to investigate the facts, and particularly to ascertain whether by International Law the ship is immune from capture as a fishing vessel.

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The *Berlin*, as appeared from the ship's papers, was a German fishing lugger of 110 metric tons, built in 1892, and manned by a crew of 15 hands. She belonged to the port of Emden, and was owned by the Emden Herring Fishery Company, of Emden. She had on board 350 empty barrels, 100 barrels of salt, 50 barrels of cured herrings, and ship's stores in 15 barrels. She carried one boat, and had two drifts of nets, consisting of 42 and 43 nets each drift, two bush ropes, and a small steam boiler and capstan. The vessel, as appeared from her log, had been on a fishing voyage in the North Sea for a considerable time. From July 27 onwards she had been catching herrings, fishing in latitudes between 55 deg. and 58 deg. 30 min. N., and in longitudes between 1 deg. E. and 1 deg. W., and in depths of from 66 to 148 metres. Her position on August 1-2, as given in her log, was 55 deg. 35 min. N. latitude and 0 deg. 32 min. E. longitude, and on August 4-5 58 deg. 28 min. N. latitude and 0 deg. 33 min. E. longitude. She was at these times, therefore, far out in the North Sea, at distances 100 miles, more or less, from the nearest coast, viz., Great Britain, and 500 miles, more or less, from her home port and from the German coast.

She was brought into the port of Wick in the early morning of August 6 by the s.s. *Ailsa*, and given into the possession of the Chief Officer of Customs, who retained her as prize captured at sea.

There was no direct evidence in the legal sense, as used in our municipal courts of law, of her capture by one of His Majesty's ships, or of the place or time of her capture. It was reported to the officer of the s.s. *Ailsa* that she had been captured by H.M.S. *Princess Royal*, and by him that she was handed over by the commander to the s.s. *Ailsa* to

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be taken into Wick harbour. I saw a confidential report made in the course of his official duty by the commander of H.M.S. *Princess Royal* of the capture, and it appeared that the exigencies of war rendered it necessary for him to request the s.s. *Ailsa* to take the captured vessel to Wick harbour on his behalf. It appeared also that the capture took place at 11 30 a.m. on the 5th day of August. I should, apart from this, have presumed that the capture was not made until after war was declared on August 4 (11 o'clock p.m.). When the capture took place the vessel was in the North Sea, approximately in the position which I have stated.

It would have been advisable, inasmuch as His Majesty's ship was unable to take the captured vessel to port, or to put a prize crew upon her for the purpose, for the commander to enter the time and place of capture in the vessel's log, or to make a declaration in the presence of the vessel's master, lest objection might be made of the absence of direct legal evidence. But, fortunately, in this Court I am entitled to act upon other evidence or reliable information, and to draw inferences therefrom upon which the Court may think it safe and just to act. Eminent judges (amongst them Lord Russell of Killowen) have commented upon the strict technicalities of some of the rules of evidence in our courts of law, and, admirable and wholesome as they are in the main, it would appear that some of them tend to shut out facts which might with advantage to the course of justice be made known to the Court. However this may be, the Prize Court is not bound by such confining fetters as our municipal courts.

Upon this subject Dr. Lushington laid down the practice as follows :

With regard to the evidence to be produced in the Admiralty Courts with respect to blockades, and indeed I may say all other questions of prize, I believe the practice



to have been, not to entertain objections to the admissibility of the evidence offered, but to receive all that might be tendered; and certainly we have in this case the licence of evidence of every kind and description which could well be offered to the consideration of the Court.

I apprehend that this, so far as I know, the universal practice of the Court, was adopted for several reasons.

*First*, because the Prize Court, being, not a municipal Court, but a Court for the administration of *public* law, was not restrained, with regard to evidence, by those rules which are applicable to questions of municipal law.

*Secondly*, it would be most difficult, even if possible, to have laid down any rules of evidence; because this Court, having to concern itself with the transactions of various nations, could never construct a code in conformity with all their various rules, and consequently injustice might be done by excluding, in transactions in which they were interested, proofs recognised by themselves.

*Thirdly*, because of the extreme difficulty of procuring what we are accustomed to call the best evidence, when such evidence is to be obtained from distant countries.

*Fourthly*, because, though the Court may receive all, it will form its own judgment, according to the circumstances of the case, of the weight to be attributed to each species of evidence, and is not supposed to be liable to the error of giving undue importance to any evidence, merely because it does not exclude it. (The *Franciska* (1855), Spinks 111, at p. 137; 2 E.P.C. 346, at p. 394.)

I have stated the conclusions of fact to which I have come in the present case. The question now remains whether such a vessel is immune from capture as a coast fishing vessel.

The history of the varying practices in this and other countries of exempting from capture in war vessels engaged in coast fishing, up to the year 1899, has been given in the Supreme Court of the United States of America in the case of the *Paquete Habana* and the *Lola* (175 U.S. Reports, 677). The judgment of the Court was delivered by Mr. Justice Gray. It is full of research, learning, and historical interest. As such an elaborate and complete

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*résumé* is available in that judgment, it would be a work of supererogation for me to attempt to perform a similar task.

The conclusions stated by Mr. Justice Gray, which form the judgment of the majority of the Supreme Court, were as follow :

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilised nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high seas in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

This rule of International Law is one which Prize Courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own Government in relation to the matter. (p. 708.)

Since the date when that judgment was pronounced the matter has been dealt with by Japan in its Prize Regulations and in some of its Prize Court decisions, and it forms also the subject of one of The Hague Conventions of 1907.

Article XXXV. of the Japanese regulations governing

captures at sea, which came into force on March 15, 1904, provides as follows :

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All enemy vessels shall be captured. Vessels belonging to one of the following categories, however, shall be exempted from capture if it is clear that they are employed solely for the industry or undertaking for which they are intended :

- (1) Vessels employed for coast fishery.
- (2) Vessels making voyages for scientific, philanthropic, or religious purposes.
- (3) Lighthouse vessels and tenders.
- (4) Vessels employed for exchange of prisoners.\*

In the case of the *Michael*, heard in the Japanese Prize Court in 1904,† which related to what was alleged to be a *deep sea fishing vessel*, it was claimed that :

The vessel, though a deep sea fishing vessel, was not engaged in traffic forbidden in time of war, nor was she carrying contraband of war, and consequently being harmless should be released in accordance with the intention which underlies the exemption from capture of small coastal fishing boats.

Upon this the decision of the Court ran as follows :

The claimants also argued that the vessel should be released in accordance with the intention underlying the exemption from capture of small coastal fishing boats, but the usage of International Law by which small coastal fishing boats are not captured arises mainly from the desire not to inflict distress upon poor people who are not connected with the war, and the principle cannot be extended to a vessel like the *Michael* which was the property of a company, and engaged in deep sea fishing.

The point was not raised in the Higher Prize (Appeal) Court.

\* Takahashi, *International Law applied to the Russo-Japanese War*, 778, at page 783.

† *Russian and Japanese Prize Cases*, Vol. II., page 80.



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Similarly, in the case of the *Alexander*,\* the same Court pronounced as follows :

It is also argued by the claimants that the vessel should be released in accordance with the intention underlying the exemption from capture of small coastal fishing vessels, but the usage of International Law by which small coastal fishing vessels are not captured arises mainly from the desire not to inflict distress on poor people who are not connected with the war, and clearly cannot be extended to a vessel like the *Alexander*, the property of a company, and, moreover, engaged in deep sea fishing.

Upon appeal, one of the grounds of appeal was :

Again, the reasoning in the decision appealed from, that as the exemption from capture of small coastal fishing vessels chiefly arose from the desire not to inflict distress upon poor people unconnected with the war, it could not, therefore, be extended to a vessel like the *Alexander*, which was engaged in deep sea fishing, shows that the claimants' point had not been understood. What the claimants desired was that the Imperial Prize Court should, in the light of recent developments in International Law, not adhere to old usages but create new precedents.

Upon which the Court adjudged in somewhat quaint fashion as follows :

The appellants also desired that a new precedent should be established in the light of recent developments of International Law, by the exemption from capture of a vessel which, as in the present case, was engaged in deep sea fishing. . . . The appellants' request that a new precedent should be created by the exemption from capture of a deep sea fishing vessel is nothing more than a simple expression of their hopes, and the second ground of the appeal is therefore also devoid of substance.

I do not propose to make any pronouncement in the case now before the Court as to whether the German

\* *Russian and Japanese Prize Cases*, Vol. II., page 86.



Empire or its citizens have in the circumstances of this war the right to claim the benefit of The Hague Conventions. But in order to show how the doctrine with which I am now dealing has been treated by the nations with the progress of years and events, I refer to Article 3 of the Eleventh Hague Convention of 1907, which is as follows :

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Vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture together with their appliances, rigging, tackle, and cargo.

This exemption ceases as soon as they take any part whatever in hostilities.

The Contracting Powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance.

In this country I do not think any decided and reported case has treated the immunity of such vessels as a part or rule of the law of nations. (*Vide* the *Young Jacob* and *Johanna* (1798), 1 Ch. Rob. 20, and the *Liesbet van den Toll* (1804), 1 E.P.C. 479 ; 5 Ch. Rob. 283).

But after the lapse of a century I am of opinion that it has become a sufficiently settled doctrine and practice of the law of nations that fishing vessels plying their industry near or about the coast (not necessarily in territorial waters), in and by which the hardy people who man them gain their livelihood, are not properly subjects of capture in war so long as they confine themselves to the peaceful work which the industry properly involves.

The foundation of the doctrine is stated by Hall (*International Law*, 6th ed., p. 446) as follows :

It is indisputable that coasting fishery is the sole means of livelihood of a very large number of families as inoffensive as cultivators of the soil or mechanics, and that the seizure of boats, while inflicting extreme hardships on their owners, is as a measure of general application wholly ineffective against the hostile State.

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The rule is formulated by Westlake (*International Law*, Part II., War, p. 155) in these terms :

*Coast Fisheries.* Immunity from capture on the ground of their being enemies or enemy property, but not from capture and condemnation on the ground of breach of blockade, is enjoyed by the men, boats and tackle employed in coast fisheries, and their cargoes of fresh fish, including fish kept alive by contrivances on their way to market; so long as the men and boats are not engaged in any warlike employment—in which scouting, exchanging signals with the forces on their side, and carrying arms would be included—so long also as in the opinion of the hostile Government or its naval commanders concerned they are not likely to be engaged in any warlike employment.

And he adds :

If the opinion here referred to is only that of the naval commanders concerned, the Prize Court before which the captures are brought will have to release them unless the warlike intention of the captured is proved to its satisfaction; but if the captures were made in pursuance of a Government order, the Prize Court, in the absence of anything to the contrary in the constitution of the country, will be bound by such an order as emanating from the authority under which it sits.

It is obvious that in the process of naval warfare in the present day such vessels may without difficulty and with great secrecy be used in various ways to help the enemy. If they are, the immunity would disappear, and it would be open to the naval authorities under the Crown to exclude from such immunity all similar vessels, if there was reason for believing that some of them were utilised for aiding the enemy. And this seems to be the sense in which the second paragraph of Article 3 of The Hague Convention referred to should be regarded.

As to the *Berlin*, I am of opinion that she is not within the category of coast fishing vessels entitled to freedom from capture; on the contrary, I hold that by reason of

her size, equipment and voyage, she was a deep sea fishing vessel engaged in a commercial enterprise which formed part of the trade of the enemy country, and as such was properly captured as prize of war.

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I therefore decree condemnation of the vessel and cargo, and order the sale thereof.

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COUNSEL

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For the Crown ... .. *Arthur Pritchard.*

SOLICITOR

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For the Crown ... .. *The Treasury Solicitor  
for the Procurator-General.*



German Schooner

“MÖWE.”

88 Tons.

(HARM SCHIER, *Master.*)

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*Owner* : Harm Schier, Rhaudermoor.

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This case is also reported

[1915] P. 1.

59 S. J. 76.

84 L. J. P. 57.

31 T. L. R. 46.

112 L. T. 261.

1 Trehern, 60.

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*Enemy Ship—Appearance of Enemy Owner—Practice in Crimean War—in Spanish-American War—in Russo-Japanese War—Prize Court Rules, 1914, Order XLV.—The Hague Conventions of 1907—Capture “ in Port ” or “ at Sea ”—Meaning of “ in Port ”—of “ Rencontrés en mer en pleine mer.”*

*Held*, with regard to the claim of an enemy ship to be entitled to appear, that the Prize Court has the right to give directions as to the practice to be followed.

The Court directed that when an enemy conceives that he is entitled to any protection, privilege or relief under The Hague Conventions of 1907, he shall be allowed to appear and support his claim.

*Held, further*, that in the Sixth Hague Convention of 1907 (which provides that when a merchant ship belonging to a belligerent power is in an enemy port at the commencement of hostilities it shall not be confiscated), the word “ port ” must be construed in its popular or commercial sense, and that a German vessel captured on the outbreak of war in the Firth of Forth, though within the limits of the fiscal port of Leith, was not exempted from condemnation.

The ATTORNEY-GENERAL (*The Right Hon. Sir John Allsebrook Simon, K.C.V.O., K.C., M.P.*) stated that this was a German sailing ship, which was captured on August 5, 1914, in the Firth of Forth by H.M.S. *Ringdove*. She was stated in the captor's affidavit to have been then within the port of Leith—that is, the fiscal port. The ship was bound from Nordeney to Bo'ness, though the master's affidavit declared the destination to be Morrison's Haven. According to that affidavit, the master, who was also the owner, was told in the evening of August 4 by the Customs authorities at Morrison's Haven to proceed to Granton, on her way to which port she was seized by the *Ringdove*. The fact of such instructions was denied by the Customs Officer at Morrison's Haven, who declared that the master said he was bound to Bo'ness. The case for the Crown was that the ship had not, when captured, arrived at a "port" within the meaning of Art. 1 of the Sixth Hague Convention of 1907,\* viz., as in the ordinary sense of the term, at a place where a ship could load and unload—not a fiscal port under municipal customs regulations. This view of the word agreed with its commercial use: e.g., for insurance purposes—see *Hunter v. Northern Marine Insurance Co.*† The vessel never reached the "port" of Morrison's Haven, in this sense, and was never "in port." Even if she had, she was no longer "in port" when captured. He therefore asked for condemnation.

As to the right of an enemy owner to appear and be

\* Art. 1.—When a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it.

The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out.

† (1888) 13 App. Cas. 717, at pages 722, 733.

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—  
Before the  
Right Hon.  
Sir Samuel  
Evans,  
President of  
the Probate,  
Divorce, and  
Admiralty  
Division.



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heard, he cited *Robinson & Co. v. Continental Insurance Co. of Mannheim*,\* and contended that (1) where a person avows his enemy character without qualification, he has no right to appear and be heard; but (2) where a person avows that he is a subject of the enemy State, but has ground for urging that *pro hac vice* he stands in a position which relieves him from the pure enemy character, he is entitled to appear and be heard.

The ATTORNEY-GENERAL also referred to :

Story's *Notes on the Principles and Practice of Prize Courts*, p. 21,

and cited the following cases :

*Janson v. Driefontein Consolidated Mines, Ltd.*  
[1902], A.C. 484.

The *Fenix* (1854), Spinks, 1; 2 E.P.C. 238.

The *Panaja Drapaniotisa* (1856), Spinks, 336; 2 E.P.C. 560.

Dr. T. E. HOLLAND, K.C., following the Attorney-General, submitted (1) that in respect of enemy plaintiffs, the rule excluding them from appearance prevails in all British Courts, and can hardly be abrogated otherwise than by Act of Parliament; (2) that claimants in the Prize Court are in the position of a plaintiff; (3) that the comparatively simple questions likely to be raised in prize by enemy claimants are such as could safely be left to the Bench and Bar; (4) that the rule of exclusion is one of procedure, and unaffected by relaxations of substantive law, such as Orders in Council as to days of grace; (5) that the alleged non-observance of this rule in other countries is irrelevant to its authority in England.

Mr. DUNLOP : I appear on behalf of an alien enemy, on the instructions of the agent in London, who is the

\* [1915] 1 K.B. 155.



agent of the underwriters of this vessel. The owner of the vessel happens to be interned in this country and, therefore, is not an enemy within the meaning of the Proclamation.

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The PRESIDENT: That sounds strange. The owner is a German, and in consequence of something that has happened since, viz., that he is interned, you say he ceases to be an enemy. He may be released at any time. I do not know even that he is interned.

Mr. DUNLOP: I can prove that he is interned. He is resident in an internment area. I submit that you should not deal with this case as if this gentleman still held the character he had at the time the vessel was captured. The object of my contention is not to make a claim, but to urge that the ship should not be condemned, and that the proper claim which ought to be made on behalf of the Crown is a claim for detention. Owners were allowed to be heard in America in like circumstances during the Spanish-American War. It was also the practice in the Russian and Japanese Courts during the war between those countries.

I am told, indeed, by a gentleman who has just come from Antwerp that at the Belgian Court there during this war Germans were allowed to appear. There is now sitting behind me an American lawyer who has recently been at Hamburg, and has seen the working of the German Prize Court there. That gentleman has stated that British subjects are allowed to appear at the Prize Court there at the present time.

The PRESIDENT: Do you put your case as high as this, that in any matter in which International Law is to be discussed here, in which an alien enemy is interested, he has the right to appear, apart from the Convention?

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Mr. DUNLOP : Yes, I submit that he has the right to appear in every case, apart from the Convention. I think it is of great public importance that he should be allowed to appear.

I think it would be contrary to natural justice if goods were seized and the owner were not allowed to come forward to put his case before the Court. It would be contrary to natural justice in a Prize Court which is in the nature of an International Court.

The PRESIDENT : So far as I know, there is no case where an enemy has been allowed to appear in the British Prize Courts except where rights are claimed under an Order in Council.

On the meaning of the word " port " Mr. DUNLOP said that he did not assent to the argument that a port had the narrow meaning which the Attorney-General attributed to it under The Hague Convention.

The PRESIDENT : If a German vessel, after the outbreak of hostilities, was going up the Bristol Channel, she would pass such ports as Swansea, Neath, Penarth, Barry and Cardiff. She might be not only within the limits of the ports of these places, but within territorial waters.

Mr. DUNLOP : If a ship is in any place where it is liable to be seized by the Customs officials, then it is within a port within the meaning of The Hague Convention. The Hague Convention deals with cases where at the outbreak of war foreign ships happen to be in such a position that the land authorities could seize them. It is conceded in this case that the ship was within the fiscal limits of the port of Leith and within the area within which she could be captured or seized or detained by the land authorities.

Within the fiscal limits of any place or port, the only persons having a right to seize are the Customs Officers. Any place within which the Customs Officers have power



to seize a vessel is a port within the meaning of The Hague Convention.

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In insurance policies the word "port" is not confined to a harbour, but is used in a very much wider sense, viz., in contradistinction to the high seas, the point of distinction being that if a vessel is in port, then she is liable to be seized by the land authorities. Any place is a port for the purpose of insurance which is a place where the Customs Official would properly effect seizure.

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According to the affidavit, the vessel, although she may not have arrived inside the creek, had arrived in Morrison's Haven for the purpose of loading her cargo of coal, and, whether she anchored inside or off the creek, I submit she was in the port of Morrison's Haven at the time at which war broke out, which was the material time under The Hague Convention, and therefore came within Art. 1 of the Convention. The ship was lying at the outbreak of war at Morrison's Haven. After war had broken out, and before the master knew, she was told to proceed further up to Granton. In accordance with the order the vessel proceeded to Granton. She ought to be treated as having remained all the time in an enemy port, although in obedience to the Customs Officers she may have been moving from one port to another. It was more convenient for the Customs Officials to deal with her at Granton than at Morrison's Haven.

Mr. Dunlop cited the following cases :

The *Fenix* (1854), Spinks 1 ; 2 E.P.C. 238.

The *Pedro* (1899), 175 U.S. Rep. 354.

The *Guido* (1899), 175 U.S. Rep. 382.

The *Buena Ventura* (1899), 175 U.S. Rep. 384.

The *Panama* (1900), 176 U.S. Rep. 535.

The *Paquete Habana* (1899), 175 U.S. Rep. 677,  
and those reported in the *Russian and Japanese Prize Cases*, referred to in the Judgment.



## JUDGMENT.

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The PRESIDENT (*The Right Hon. Sir Samuel Evans*) :  
This was a merchant sailing vessel, of the Port of Rhaudermoor, in Germany. Her master was Harm Schier, a German subject. He was also the sole owner of the vessel. She was captured by H.M.S. *Ringdove* on August 5 last in the Firth of Forth and taken into Leith. Her ship's papers showed that she was a German vessel, and had sailed from Nordeney, in Germany, and that her destination was Bo'ness, in the Forth. The master in an affidavit deposed that he was bound for Morrison's Haven for coal. That statement is not accurate; but in the circumstances it is not material to any issue. He arrived near Morrison's Haven somewhere between 7 and 9 o'clock in the evening of August 4. At this time hostilities between this country and Germany had not begun. The Declaration of War was made as from 11 p.m. on that day. He came to anchor about a mile off the creek of Morrison's Haven. He had a conversation with the Officer of Customs of this place; his account of it differs from that of the Customs Officer. Again, this is not material to any question in issue. If it were, I accept the latter's account. The master, in his affidavit, seems to make some point of what he alleged took place; but no argument was based upon this at the trial. Early in the morning of August 5 he weighed anchor and proceeded under way, according to his account, for Granton, a port about eight miles higher up the Firth of Forth than Morrison's Haven. After being under way for about an hour the vessel was captured as prize by H.M.S. *Ringdove*, when—to use the words in the affidavit of her master—"she was in British territorial waters between Morrison's Haven and Granton." In a subsequent paragraph he said the vessel was "taken at sea." It was not shown that the master knew

of the outbreak of war when the vessel was captured, and, for the purposes of this case, it is assumed that he did not know. An appearance was entered in these Prize proceedings by Harn Schier "as owner of the vessel."

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The first question which arises for decision is whether, in the particular circumstances of this case, Schier, an admitted enemy subject, and the owner of an enemy merchant ship, has a right to appear as a claimant in the proceedings, or whether he should be given such a right in order to assert whatever privileges he deems to be conferred upon him by the Sixth Hague Convention of 1907.

The second question to be determined is whether the vessel was in an enemy port and not allowed to leave at the commencement of hostilities, or whether she was encountered and captured at sea within the meaning of the Sixth Hague Convention of 1907. Assuming the question to depend on the Convention, in the former case the vessel is only to be detained and not confiscated, in accordance with Arts. 1 and 2; in the latter she is subject to condemnation, as Germany made a reservation with respect to Art. 3 and is not a party to it.

Pending the decision upon the first question, I allowed Counsel (who was instructed to appear for the enemy owner) to present his arguments fully as *amicus curiæ* upon the two questions to be decided.

The question of the right to appear naturally comes first. I have already dealt with this matter in one of its aspects in the *Marie Glaeser*.\* In that case an appearance in the proceedings was entered for the enemy owners, but at the hearing no one came forward to represent them. It was obvious that no ground could be shown either under The Hague Convention or otherwise against the ship's capture and condemnation; and I ordered the appearance to be struck out both on the ground of the insufficiency of

\* (1914), ante, Vol. I., page 56; [1914] P. 218, at pages 221-223.



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the affidavit upon which the appearance was founded, and on the ground that there were no substantial special circumstances which could be put in any other affidavit in support of any valid claim. I may mention incidentally in passing that the gentleman who made the affidavit as agent for the owners founding the appearance in that case has been convicted at the assizes recently for the offence of trading with the enemy.

In the case now before the Court, although the affidavit of the claimant is not very aptly drawn to set forth a claim, it is contended that he is entitled under the said Hague Convention to appear to resist condemnation of his vessel, and to secure that the vessel be subjected only to a decree of detention without compensation during the war, or requisition upon making compensation. I will assume that the affidavit sufficiently disclosed the special circumstances in which this contention is put forward. I will also assume that The Hague Convention referred to is in force and applicable. Upon this a word will be said later.

I referred in the *Marie Glaeser*\* to some decisions of Lord Stowell and Dr. Lushington, and I will not repeat them. There are other decisions to the like effect, e.g., in the *Falcon*.† In the following passages Lord Stowell deals with the disabilities of citizens of a hostile State in this Court, and of citizens of this country in the Courts of an enemy :

He is, it seems, invested with the character of the American Consul at Bordeaux; and certain it is, that an American Consul resident in France is subject to all the disabilities of a French merchant, as to the power of becoming a claimant in this Court.

But I am to recollect who the persons are from whom the objection comes. They are British subjects, who could

\* (1914), ante, Vol. I., page 56; [1914] P. 218, at pages 221-223.

† (1805) 6 Ch. Rob. 194, at pages 197, 199.



have no *persona standi* there (*i.e.*, in French Courts), and could not have been parties to the proceedings either in the Court of Leghorn, or Paris, without stating themselves out of court. It was impossible that the proceedings could be otherwise conducted; and, therefore, I cannot think that the absence of the parties, which is urged as a fundamental defect, is material in such a case. It is nothing more than what takes place here in cases of common condemnations, which do not rest solely on the effect of the monition, but pass on a view of the evidence of the case. The enemy proprietor is necessarily absent by operation of law, and yet the sentence is completely valid, as well against him as against all the world.

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All the Forms since the days of Sir James Marriott, Lord Stowell's predecessor, down to the present day accord with the principle and practice promulgated by Lord Stowell in the *Hoop*.\*

These are followed in some of the Forms appended to the recent Prize Court Rules, 1914. See Form 13, where this paragraph appears :

There were at the time of such capture no contraband goods on board the said ship, and no subject of (*insert the name of Government at war with Great Britain*) or enemy of Great Britain had at the time of such capture, or at any other time material to the matters in this cause, any share, right, title, or interest in the said ship or cargo, or any part thereof.

Far be it from me to wish to decide on mere matters of form, unless compelled thereto by the law; I only cite them to illustrate the principles and practice.

A claimant in a Prize Court is not in a position analogous to that of a defendant; but rather to that of a plaintiff. In the writ the owners of a vessel are not made defendants. But I wish to avoid complicating this case with any discussion of the position or rights of alien

\* (1799) 1 Ch. Rob. 196; 1 E.P.C. 104. See *Marriott's Formulary* (1802), *passim*.

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enemies in legal proceedings in the King's Bench or our other municipal courts.

The principle upon which the Prize Court in the times of Lord Stowell and Dr. Lushington proceeded was that no one who was a subject of the enemy could be a claimant unless under particular circumstances that *pro hâc vice* discharged him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hâc vice*. Otherwise, such a person was regarded as totally *ex lege*. In the words of Mr. Justice Story, in his authoritative work on Prize Courts, an enemy cannot

. . . interpose a claim unless under the protection of a flag of truce, a cartel, licence, pass, treaty, or some other act of the public authority suspending his hostile character.\*

In this passage Mr. Justice Story adopted the words of Lord Stowell in the *Hoop*,† adding by way of illustration the words "licence" and "treaty."

In his argument the Attorney-General submitted two propositions as embodying the result of the authorities in this Court, namely :

1. Where an owner avowed his enemy character without qualification, he had not a *persona standi in judicio* and was not a person who had a right to be heard; and

2. Where a person avowed that he was a subject of the enemy State in general, but had ground for urging that *pro hâc vice* he stood in a position which relieved him from the pure enemy character, he was entitled to appear and to be heard; and that the real question was under which of these two rules a German owner should be regarded when he came before the Court.

In my opinion that submission is well founded and accurate.

Practical illustrations of the second proposition were

\* Pratt's Story (1854), page 21.

† (1799) 1 Ch. Rob. 196; 1 E.P.C. 104. See Marriott's *Formulary* (1802), *passim*.



frequently afforded in the time of the Crimean War, when claimants appeared on the ground of the immunity of their ships from capture by reason of the Order in Council dated March 29, 1854. This Order in Council is set out at page iii., Appendix D, in Spink's *Prize Cases*. That Order allowed six weeks to Russian merchant vessels in any ports or places within the British dominions for loading their cargoes and departing from such ports or places; and also gave permission to such Russian vessels if met at sea by any of Her Majesty's ships to continue their voyage if their cargoes had been taken on board before the expiration of the six weeks. The Order also granted permission to any such Russian vessels which, prior to its date, should have sailed from any foreign port bound for any port or place in the British dominions to enter and discharge their cargoes, and afterwards forthwith to depart without molestation; and if met at sea to continue their voyage to any port not blockaded. In short, the Order in Council exempted entirely from capture Russian merchant vessels in the special circumstances therein specified.)

Claimants whose vessels were within the special terms of the Order therefore brought themselves within the category of persons who were within the Queen's peace *pro hac vice*, and who were relieved from their enemy character, or had their hostile character suspended during the operation of the Order in Council. They were accordingly heard as claimants in the Prize Court.

Reference was made in argument to cases in the American Courts arising during the Spanish-American War in 1898. Upon examination it will be found that in almost all the cases where enemy claimants were heard at that time, their claims arose in circumstances very similar to those in the class of proceedings already referred to, which came before the British Prize Court during the Crimean War.

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At the outbreak of the war between the United States of America and Spain, the President of the Republic issued, on April 26, 1898, a Proclamation exempting Spanish ships from capture in terms practically identical with the Queen's Order in Council exempting Russian ships 44 years earlier. Articles 4 and 5 of the President's Proclamation were obviously framed upon the British Order in Council of 1854.

Following upon this Proclamation of the President the cases cited before me came before the United States Courts. The *Pedro*\* turned upon Articles 4 and 5 of the Proclamation. The *Guido*† simply followed the *Pedro*. The *Buena Ventura*‡ depended upon the application of Article 5 of the Proclamation. The *Panama*|| was also decided upon Articles 4 and 6 of the Proclamation. The other case cited, namely, the *Paquete Habana*,¶ did not depend upon the provisions of the Proclamation; but it is to be observed that the claim there put forward, and decided, was also that the vessel was "exempt from capture." There may be other cases which I have not been able to examine in which enemy claimants were allowed to appear in the United States Courts. And there may be regulations touching the matter which I have not seen. But the authorities cited fall short of showing that in the United States any claimant who avowed an enemy character has been allowed generally to appear in their Prize Courts.

In argument before me counsel for the enemy shipowner also compendiously referred to cases which were heard during the Russo-Japanese War in 1904-5 and reported in the *Russian and Japanese Prize Cases*, Vol. I., p. 166, and Vol. II., pp. 1, 12, 39, 46, 52, 92, 95, 116 and 354.

\* (1899) 175 U.S. Rep. 354.

† (1899) 175 U.S. Rep. 382.

‡ (1899) 175 U.S. Rep. 384.

|| (1900) 176 U.S. Rep. 535.

¶ (1899) 175 U.S. Rep. 677.

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Upon examination of these cases again it appears that they dealt with claims either of neutrals or of claimants whose contention was that their property was entirely immune from capture and from sentence of condemnation. In most of them the claim was founded (no doubt amongst other grounds) upon the Japanese Imperial Ordinance No. 20 of February 9, 1904, which allowed days of grace to certain Russian vessels upon the same lines as the British Order in Council of 1854 and the United States Proclamation of 1898. (See Ordinance, Appendix C., Vol. II., of *Russian and Japanese Prize Cases*, p. 445.)

In the *Tetartos* (1906) (Vol. I.166), in the Russian Prize Court, the original claimants were the neutral owners of a German ship which the Russian cruiser captured and sank. It was ultimately held that the ship was wrongfully sunk. Thereupon the liquidator of what was apparently a Japanese company (the Teshio Timber Company of Otaru), the owners of the cargo which was in the captured ship and which was also wrongfully sunk, made a claim which was allowed. The other cases reported in the pages referred to in Vol. II. were heard in the Japanese Prize Courts.

In the *Ekaterinoslav* (1905) (Vol. II. 1) the owners of a Russian vessel claimed exemption from capture on grounds (*inter alia*) coming within the Days of Grace Ordinance (No. 20) already referred to.

The *Mukden* (1905) (Vol. II. 12), the *Rossia* (1905) (Vol. II. 39), and the *Argun* (1905) (Vol. II. 46) were also cases in which exemption was claimed (amongst other grounds) under the same Ordinance.

In the *Manchuria* (1905) (Vol. II. 52), and the *Lesnik* (1904) (Vol. II. 92) the same Ordinance was relied upon, and in the former case a claim was made on behalf of neutral insurers.

The claim in the *Kotik* (1905) (Vol. II. 95) was for



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exemption as a fishing vessel and also under Ordinance 20.

In the *Thalia* (1905) (Vol. II. 116) the vessel was seized near a repairing dock, and the basis of the claim was that she was property "on land" and therefore exempted from capture.

And in the *Orel* (1905) (Vol. II. 354) the capture was said to be wrongful as the vessel was a hospital ship and therefore immune, but it was held notwithstanding that she was guilty of hostile acts and therefore subject to condemnation.

I have dealt briefly with these cases, because reliance was placed upon the liberty which was said to be given by the Russian and Japanese Prize Courts to enemy claimants, as adding force to the rights asserted on behalf of enemy owners in this Court.

In each of the cases, however, which I have examined, complete immunity was claimed, as I have said.

As to Russia, I observe that Article 60 of the Regulations relating to Naval Prizes (1895) deals with "Original Owners of the Captured Property" in general terms; but I cannot say how these words would be construed.

All the cases mentioned were, of course, before The Hague Conventions of 1907.

Under the Sixth Hague Convention the attitude which the owner in the present case must take may shortly be stated in these terms :

I admit I am an alien enemy; and therefore that my ship was lawfully captured or seized as being enemy property; but I wish to appear to put forward and argue my claim that in the circumstances of my case the ship is not confiscable and cannot be condemned; but can only be detained during the war, to be restored to me after the war.

Applying the principles laid down by Lord Stowell

and Dr. Lushington, I am satisfied that in their day they would not have allowed the enemy owner to appear to assert such a claim. There is here no coming *pro hac vice* within the King's peace; there is no suspension of the hostile character. As to what those eminent Judges would have done if they lived in the present day, I will not hazard a conjecture.

As before indicated, I desire to say a word as to whether the Sixth Hague Convention is operative and applicable. I cannot close my eyes to the provision in Article 6 of the Convention, which reads as follows :

The provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

By Articles 7 and 9 the Convention requires to be ratified by the signatory Powers; and by Article 8 non-signatory Powers may accede to the Convention. There are similar Articles in other Conventions referred to later.

Of the belligerents in the present war, at the time of the capture of the vessel, Germany and Austria-Hungary, and Belgium, France, Great Britain, Japan, and Russia had ratified the Convention (Germany and Russia making reservations as to Article 3 and part of Article 4).

Of the other belligerents, Montenegro and Serbia (whose representatives signed the Convention) have not ratified it.

Turkey, which is now also a belligerent, has not ratified it.

None of these States were non-signatory Powers, so there has been no accession on the part of any of them.

In strictness therefore (apart entirely from the question whether the enemies of this country are acting under or in accordance with the Convention) it is not clear that the Convention is binding and applicable.

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It is not my function or province to do anything more than to declare the law. But I trust to be forgiven for a humble expression of opinion that it would accord with the traditions of this country if such steps were taken as may be necessary to make operative a series of Conventions solemnly agreed upon by the Plenipotentiaries of forty-five States or Powers after most careful deliberation, with the most beneficent international objects.

I am not required finally to determine the effect or the binding character of the Conventions. This Court would be mainly concerned with the 6th, 7th, 10th, and 11th of them as dealing more directly with maritime concerns: although, incidentally, others of them, e.g., the 3rd, 8th, and 13th, might come under consideration in proceedings before it. Of the belligerents, Montenegro has no navy, and, so far as I know, no mercantile marine—it has a coast line, but only of about 30 miles; and Serbia is a purely inland State, having no seaboard at all. It would scarcely seem desirable that the non-ratification by these Powers should prevent the application of the Maritime Conventions; and it may be that the counsellors, who have the responsibility of advising the Crown, may deem it fit to advise that by Proclamation or otherwise this country should declare that it will give effect to the Conventions, whether by the literal terms thereof they are strictly binding or not.

Having premised so much, I will now consider whether the owners of an enemy vessel have a right, or should be given the right, to appear to put forward a claim under The Hague Conventions, assuming, as was done during the argument, that they are operative.

Under some of the Conventions, some degree of protection and relief is given in respect of vessels which are not wholly immune from capture at sea or seizure in ports, e.g., under the Sixth Convention the consequences

of seizure or capture are minimized and limited in certain cases, although complete immunity is not afforded.

Under others of the Conventions some vessels are entirely exempted from capture. For instance, under the Tenth Convention hospital ships are free from capture, except in certain specified circumstances; and under the Eleventh Convention certain coast fishing vessels and local trading boats, as well as those employed on religious, scientific, or philanthropic missions, are similarly exempted.

With regard to vessels comprised within the Tenth and Eleventh Conventions, the cases which might arise would approach nearly to those of vessels which came within the protection afforded by the Order in Council of 1854.

Dealing with The Hague Conventions as a whole, the Court is faced with the problem of deciding whether a uniform rule as to the right of an enemy owner to appear ought to prevail in all cases of claimants who may be entitled to protection or relief, whether partial or otherwise.

Dr. Holland argued that this is a matter not of International Law, but of the practice of this Court. That view is correct.

I think that this Court has the inherent power of regulating and prescribing its own practice, unless fettered by enactment. Lord Stowell from time to time made rules of practice, and his power to do so was not questioned.

Moreover, by Order XLV. of the Prize Court Rules, 1914, it is laid down that

In all cases not provided for by these Rules, the practice of the late High Court of Admiralty of England in prize proceedings shall be followed, or such other practice as the President may direct.

The Rules do not provide for the case now arising.

I therefore assume that as President of this Court I

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can give directions as to the practice in such cases as that with which the Court is now dealing.

The practice should conform to sound ideas of what is fair and just. When a sea of passions rises and rages as a natural result of such a calamitous series of wars as the present, it behoves a Court of Justice to preserve a calm and equable attitude in all controversies which come before it for decision, not only where they concern neutrals, but also where they may affect enemy subjects.

In times of peace the Admiralty Courts of this Realm are appealed to by people of all nationalities who engage in commerce upon the seas, with a confidence that right will be done. So, in the unhappy and dire times of war, the Court of Prize as a Court of Justice will, it is hoped, show that it holds evenly the scales between friend, neutral, and foe.)

A merchant who is a citizen of an enemy country would not unnaturally expect that when the State to which he belongs, and other States with which it may unhappily be at war, have bound themselves by formal and solemn conventions dealing with a state of war like those formulated at The Hague in 1907, he should have the benefit of the provisions of such international compacts.

He might equally naturally expect that he would be heard, in cases where his property or interests were affected, as to the effect and results of such compacts upon his individual position.

It is to be remembered also that in the international commerce of our day the ramifications of the shipping business are manifold; and others concerned, like underwriters or insurers, would feel a greater sense of fairness and security if, through an owner (though he be an enemy), the case for a seized or captured vessel were permitted to be independently placed before the Court.

For the considerations to which I have adverted, and

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in order to induce and justify a conviction of fairness, as well as to promote just and right decisions, I deem it fitting, pursuant to powers which I think the Court possesses, to direct that the practice of the Court shall be, that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of The Hague Conventions of 1907, he shall be entitled to appear as a claimant and to argue his claim before this Court. The grounds of his claim should be stated in the affidavit to lead to appearance which is required to be filed by Order III., Rule 5, of the Prize Court Rules, 1914.

I will now proceed to deal with the substance of the claim of the owner in the present case. He contends that his vessel cannot be condemned as prize.

Was his vessel captured at sea or seized in port? It was argued for him that she was seized in port, and therefore ought only to be detained during the war. For the Crown, on the other hand, it was contended that the vessel was captured at sea, and ought to be condemned.

I have sufficiently stated the facts.

It was urged that the vessel was seized within the port of Leith, and, alternatively, that she was taken within territorial waters, and not "on the high seas," and therefore is not confiscable. (See Article 3 of the Sixth Hague Convention of 1907, to which Germany did not agree, and under which her citizens cannot benefit.) In this Convention I am of opinion that the word "port" must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking.

It does not mean the fiscal port. The ports of Morison's Haven, Granton, and Bo'ness, I was informed, are within the fiscal port of Leith, but they are all separate ports in the ordinary sense. The vessel was not seized



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in any of such "ports" as the term is so understood, and as it seems to me to be used in the Convention.

She was not in a port from which, if days of grace had been arranged, she could be said to "depart" (*sortir*).

Alternatively, it was alleged, but not proved, that she was taken in "territorial waters," and that, therefore, she was not captured on the high seas. But I will assume that she was within territorial waters when the capture was made. In my view that is wholly immaterial.

The Sixth Hague Convention does not refer to "territorial waters." A vessel might be in territorial waters for scores of miles either innocently or nefariously, and pass numerous ports without any intention to enter any of them. It is idle to say that on this account she would be free from capture.

Where The Hague Conventions intend to deal with territorial waters, they are expressly mentioned as distinguished from port; e.g., in Convention XII., Articles 3 and 4, and Convention XIII., Articles 2, 3, 9, 10, &c., the words *les eaux territoriales* are used in contradistinction to *les ports*. (Cf. also the Declaration of London, Article 37, where territorial waters are described as *les eaux des belligérants*.) *En mer*, which is the phrase used in Article 3 of the Sixth Convention, is altogether inapt to indicate "territorial waters."

Then it was contended that the vessel could not be condemned because she was not captured on "the high seas."

The words "encountered on the high seas" in Article 3 are not an accurate rendering of the authoritative French *rencontrés en mer*.

Where the Conventions intend to describe "upon the high seas" the appropriate phrase *en pleine mer* is used. (See Convention VII. recital.) Another phrase, *en haute*

*mer*, is used in the Declaration of London, Article 37, to signify the same thing.

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To illustrate the meaning of the word "port" in the Conventions I would further observe that the word "ports" is used in various places in conjunction with, but in contradistinction to, roadsteads and to territorial waters. (See Convention XIII., where the words "*les ports, les rades, ou les eaux territoriales*" are frequently used.)

In my view the claimant in his affidavit was accurate when he said his vessel was "taken at sea." The words of Article 3 "*rencontrés en mer*" are exactly applicable to this case. And I have no hesitation in finding that the vessel was captured at sea, and not seized in port.

I therefore decree that the vessel be condemned as lawful prize.

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#### COUNSEL

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For the Crown	...	...	...	<i>The Attorney-General.</i>
				<i>T. E. Holland, K.C.,</i>
				<i>and</i>
				<i>Norman Bentwich.</i>

For the Claimant	...	...	<i>C. Robertson Dunlop.</i>
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#### SOLICITORS

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For the Crown	...	...	...	<i>The Treasury Solicitor</i>
				<i>for the Procurator-General.</i>

For the Claimant	...	...	<i>Stokes &amp; Stokes.</i>
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German Steamship

“SCHLESNIEN.”

5536 Tons.

(H. HENSCHEN, *Master*.)

*Owners*: Norddeutscher Lloyd, Bremen.

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This case is also reported

84 L. J. P. 33.

31 T. L. R. 89.

112 L. T. 353.

1 Trehern, 13.

59 S. J. 163.

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*German Vessel—Receiving Apparatus leased from Neutral Company—Property in Apparatus—Declaration of Paris.*

*Held* that a receiving apparatus on an enemy ship leased from a neutral company was not exempt from condemnation as being “neutral goods” within the meaning of the Declaration of Paris, and that the Prize Court would not investigate the property in parts of the ship.

The Court has given a general direction that goods belonging to the captain and crew of enemy ships, e.g., private chronometers or compasses, shall be given up to their owners.

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STEAMSHIP  
“SCHLESNIEN.”  
—  
Before the  
Right Hon.  
Sir Samuel  
Evans,  
President of  
the Probate,  
Divorce, and  
Admiralty  
Division.

Mr. COLIN SMITH applied for condemnation of the steamship *Schlesien*, belonging to the Norddeutscher Lloyd. She was captured two days after the outbreak of war, in the Bay of Biscay, and taken into Plymouth. The ship's papers showed she was registered at Bremen and was a German ship. She carried a miscellaneous cargo, about which a number of questions might arise hereafter. He only asked for the condemnation of the ship.

Mr. C. ROBERTSON DUNLOP said he appeared in support of a claim by the Submarine Signal Company, of Boston,

Mass., to a receiving apparatus which they had installed in this ship for recording all sounds which could be transmitted by water. They were received by an officer in a kind of telephone apparatus. It was only a receiving apparatus, and messages could not be sent by it. The apparatus was leased to the ship under an agreement which said that the apparatus was to remain the sole property of the company which leased it to the ship. That was set out in an affidavit by Mr. Madden, of 88, Broad Street, Boston, Mass. He said it was an American company, which had agencies all over the world. The agreement in question here was made by the Bremen agency of the company, and the original was in Bremen, so that it could not be produced.

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STEAMSHIP  
"SCHLESSEN."

Mr. LESLIE SCOTT, K.C. (who was with Mr. Dunlop), replying to the President, said the Bremen branch was a mere conduit-pipe for making the agreement on behalf of the American company.

The PRESIDENT said he had no information as to the constitution of the Bremen branch. It might be very important to know that.

Mr. SCOTT submitted that these were goods which were covered by the Declaration of Paris. If his Lordship thought the affidavit was not sufficient he asked for an adjournment to enable his clients to file further evidence as to the agreement, because it was very hard that such points should be taken against them in the Prize Court. They could not, in the nature of things, produce all the evidence that might be desirable in a common law action. The claimants here were a neutral corporation, and they were entitled to the same indulgence as neutral cargo-owners. If this was a neutral cargo and the documents of title happened to be in Germany, and there was no question



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"SCHLESSEN."

as to who was the owner of it, the Court would not condemn the cargo.

The PRESIDENT pointed out that the Declaration of Paris only affected cargoes. The French word was "marchandise." It was obvious that it related only to neutral cargoes.

Mr. SCOTT said this was a new point of considerable importance, because these apparatus were valuable, and were installed on a large number of ships. He was not sure that the Marconi apparatus was not fitted in the same way and on the same terms, the property remaining in the Marconi Company. The principle was clear. This was neutral property, and the Declaration said that neutral property was not to be tainted by the enemy character of the ship in which it was carried. There were two propositions involved. One was that it came within the principle of the Declaration of Paris. The British Executive did not, as a matter of policy, confiscate the property of neutrals. The other principle was that there was no object of an executive character which could be achieved by adopting the practice of capture and confiscation in regard to such goods as these.

The PRESIDENT: Supposing the ship had a Marconi apparatus on it; would not the ship fetch more because of that?

Mr. SCOTT: The English Government have nothing to do with that. The policy is to put pressure on the enemy, and that is not achieved by seizing neutral property.

The PRESIDENT: It might make the enemy liable to the neutral owners.

Mr. SCOTT: I submit that neutral property is protected. The policy is to hurt the enemy without hitting neutral friends.

The PRESIDENT : There is the question whether as a matter of law I ought to be troubled with all these details. I am not saying that it might not be a proper thing for the captors to give up these things to the claimants. The question is whether I ought to be called upon to investigate these small matters, or ought to condemn the ship as she stands, apart from the cargo.

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Mr. SCOTT : I do not see any public ground on which your Lordship should not be troubled with these matters. This is not a small matter, and it raises a point of general principle.

The PRESIDENT : There may be hundreds of small things of this character on a ship, hired in a similar way. If things are hired in this way there are certain risks of the ship being in difficulty either in the sea or in a war.

Mr. SCOTT : The company might run marine risks. I have not considered it. But I submit it is irrelevant who insured the things.

The PRESIDENT : I am not going to make an order confiscating this property at all. I shall make an order condemning the ship.

Mr. SCOTT : That is condemning the property.

The PRESIDENT : You might have the anchor or the steering gear or the propeller hired in the same way.

Mr. COLIN SMITH, in reply, submitted that this apparatus was a thing which was used in the navigation of the ship, and, being found on an enemy ship, although it was of neutral origin, it was liable to confiscation. He also contended that the agreement of lease showed that the real owners of the apparatus were the Bremen agency and not the American company.



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The PRESIDENT (*The Right Hon. Sir Samuel Evans*) :  
In this case the ship was captured at sea by one of His Majesty's ships, and, according to the ship's papers, it is clear she belongs to an enemy subject. I therefore condemn the vessel as prize, and order her to be sold.

A claim has been made on behalf of the Submarine Signal Company, of the State of Massachusetts, U.S.A. The foundation of the claim is that the company only lent a certain apparatus of submarine signalling, which was fixed somewhere on board the ship, how and where I do not know. It is said that the property is the property of the American company by reason of an agreement. The affidavit of Mr. Madden says that the company has an agency at Bremen. I know nothing about the constitution of the so-called agency at Bremen, and the document which, it is said, constitutes the loan of this apparatus to the steamship company from the American company is not produced, nor is a copy of it exhibited. The affidavit says it has never been the practice of the Bremen agency to send copies of such agreements to the company in America. It may be that the German document is *mutatis mutandis* in a form similar to the agreement which has been exhibited to the affidavit. Of that I know nothing, and I do not think I ought to guess. It may be that by the constitution of this agency they are the real owners of the apparatus, and not the American company at all.

A very nice question may arise on that particular head. I have not enough evidence to enable me to say that this apparatus belonged to the American company and did not belong to the Bremen agency. But I am willing to assume, for the purpose of my judgment, that the property was comprised in a document like the lease and agreement exhibited here.

It is said this is property belonging to a neutral and, therefore, ought to be released. The first argument of Mr. Leslie Scott was that by the express terms of the Declaration of Paris this apparatus might be described as neutral goods, and that the claimants are entitled to the benefit of the Declaration. It is true that the words "neutral goods" and "enemy goods" are used in the English translation of the Declaration; but it is equally true that everybody up to now has read them in the sense of cargo goods laden and carried on board the ship; and on reference to the French text of the Declaration it is clear that what it was intended to cover was merchandise. This apparatus was not such merchandise.

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When that was pointed out to Mr. Leslie Scott, he said: "Well, anyhow, we are within the spirit of the Declaration." [The intention of the Declaration was to make things during war as easy and as little disturbing as possible to those who were engaged in neutral commerce. Now, it is perfectly obvious that in a ship of modern construction many kinds of apparatus similar to this one may be installed in the ship and form part of the vessel itself. Far be it from me to say that, if these things can be easily detached, the captors ought not—if in their discretion they think fit to do so—to hand over these goods to the persons who appear to be the owners. Goods belonging to the captain and crew of vessels, such as private chronometers, compasses and sextants, have been given up; and I have given general directions to the Marshal since the war to hand such goods on board such vessels to the captain and the crew. But it is a wholly different thing to say that the claimants of goods of this description have the right to come to this Court and say: "This particular piece affixed to the ship belongs to me, and I therefore desire and request you to adjudicate upon it and upon all sorts of legal questions which may relate to it, either



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by the law of Germany, or by the law of America, or by the law of any other country."

The Prize Court does not exist for that purpose. The Court decides whether, having regard to the ship as it stands, apart from the cargo, it is a subject-matter fit for condemnation as prize. I have already condemned the ship as prize, and I am not called upon in this Court to investigate such matters as the property in parts of the ship, whether they have been leased, or whether the property in them remains in the original lessors. These are matters which I have not got to determine. I do not say that because I am not conscious of the importance of doing what is right and fair to any neutral in respect of any property which is clearly shown to be his; but in a case of this description it must be dealt with by the Executive, and those who advise the Crown. So far as this Court is concerned, the apparatus is to be regarded as part of the ship, which I condemn. ]

Mr. DUNLOP : This is a new question, so may I ask for leave to appeal ?

The PRESIDENT : Very well ; but because I give leave to appeal, that does not mean that I have any doubt in my own mind as to the propriety of my decision. I suppose it is well known that the Procurator-General lends a willing ear to any claim from those who do not belong to the enemy in matters of this description.

It is also equally well known that if you are not able to prevail upon him to assent to any claim which you think ought to be sustained, there is a Committee appointed by the Executive, which constantly deals with cases where claimants allege they ought to be met out of the bounty of the Crown, where they cannot get relief by law.

COUNSEL

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[illegible]

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**For the Submarine Signal Co.**     *Leslie Scott, K.C.  
C. Robertson Dunlop.*

## SOLICITORS

For the Crown      ...      ...      ...      *The Treasury Solicitor  
for the Procurator-General.*

For the Submarine Signal Co.     *Waltons & Co.*



## British Steamship

"SYRIA." 6683 Tons.

(Part Cargo *Ex.*)

(C. W. BURLEIGH, Master.)

Owners : Peninsular & Oriental Steam Navigation Co.,  
London.

*British Ship—Enemy Shippers—Enemy Purchasers—British Pledgees—Advance of whole invoice Value—Alternative Destinations—Exercise by Pledgees of Option to determine Destination—Goods landed on Quay—Seizure on Land—Delivery to Warehouseman to hold to Order of Customs—Goods condemned.*

The *Aldworth* (ante, Vol. I., p. 137), the *Odessa* (ante, Vol. I., p. 301), and the *Roumanian* (ante, Vol. I., p. 191) followed.

*Japanese Shippers—Contract for Sale to Enemy—Consignment to own Branch in enemy Territory—Bills of Lading Act, 1855—Withdrawal of Agents from enemy Territory on Outbreak of War with Japan—National Character of Branch—Goods released.*

*Enemy Shippers—British Buyers to whom Property had not passed—Goods pledged to Bank with Head Office in neutral, but Agency concerned in enemy, Territory—Goods condemned.*

*Purchase by Neutral at Date of Shipment—Goods released.*

*Practice—Sale—Prize Court Rules, 1914, Order XV., Rule 7—No conditional Condemnation—Condemnation in Default of Claim or Appearance—Admission or Leave to Appeal—Prize Court Rules, Order XLIV., Rule 2—Payment into Court on Adjournment for further Proof.*

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—  
Before the  
Right. Hon.  
Sir Samuel  
Evans,  
President of  
the Probate,  
Divorce, and  
Admiralty  
Division.

Mr. MAURICE HILL, K.C. (for the Crown), said he had to move for the condemnation of a number of parcels of goods forming part of the cargo of the P. & O. Steam-

ship *Syria*. The vessel was loaded in July, 1914, at Japanese and Chinese ports. She arrived in London on September 29, and the usual preliminary notices of detention of suspected cargo were given at once. The goods now claimed, with the exception of certain zinc ore, were seized on October 24, and the zinc ore, of which there were 3,600 bags, was seized on October 29. There were 17 items of goods altogether.

With regard to the first six items and one other item, all consisting of strawbraids, there was a claim by the Chartered Bank of India, Australia and China.

In the case of an item of 135 bags of ground nuts, there was originally a claim by the Deutsche Bank (Berlin), London Agency, but that claim was withdrawn, and a claim was substituted by the Deutsch-Asiatische Bank.

Then there was a claim in respect of 3,600 bags of zinc ore by Mitsui & Co., who had houses in Japan, London, and Hamburg, their main home port being in Japan.

Notices of claims had also been given in regard to others of the 17 items, and probably those claims would have to stand over.

#### CLAIM OF THE CHARTERED BANK OF INDIA.

Dealing first with this claim, Mr. HILL submitted that as regarded items one to six, the bank were pledgees of the bills of lading to secure advances made by them, and that the property in the goods was in the German shippers, Arnhold, Karberg & Co., of Tsingtau. The claim was, therefore, covered by his Lordship's decisions in the *Odessa*\* and *Cape Corso*\* cases.

Mr. LESLIE SCOTT, K.C. (for the Claimants): I agree that Arnhold, Karberg & Co. have a house in

\* (1914), ante, Vol. I., page 301. The *Odessa* was affirmed on appeal see post in this Volume.

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Tsingtau, and also one in London. There are four partners, two of whom are Englishmen and two Germans.

Mr. HILL : For the purposes of prize, this transaction by the Tsingtau house was in order to carry on a business in German territory.

Mr. SCOTT : I agree that the shippers were in Tsingtau.

Mr. HILL (continuing) said that the people in whom the goods were vested were in Dresden. There was an arrangement made by telegrams of credit under which these shipments were financed by the Chartered Bank of India. In one case the Tsingtau firm drew upon Arnhold, Karberg & Co., of London. In two others they drew upon the buyers in Dresden, and in three cases they drew upon the Deutsche Bank in Hamburg. By arrangement between that bank and the buyers, the bills of exchange were in favour of the Chartered Bank of India, and the branch of the latter bank at Tsingtau cashed the bills against shipping documents. When the bills and the shipping documents came forward to England the war had begun, and, therefore, none of the bills was accepted by the drawees. Arnhold, Karberg & Co., of London, refused to accept the bill drawn on them, on the ground that it would involve trading with the enemy. The other five could not be presented, because they were all drawn upon people in Germany.

The PRESIDENT : Is there any distinction between this case and the *Odessa* ? \*

Mr. SCOTT : I do not think there is any distinction that your Lordship will draw.

The PRESIDENT : I mean for the purposes of to-day, is this claim covered by the *Odessa* decision ?

\* (1914), ante, Vol. I., page 301; on appeal, post. in this Volume.

Mr. SCOTT : I think so, my Lord. There are two other points, but I think your Lordship has also decided those against me in other cases.

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The PRESIDENT : Then for the purposes of to-day you do not oppose condemnation of this part of the cargo ?

Mr. SCOTT : I put up an opposition which I think your Lordship will disregard.

The PRESIDENT : You admit that the *Odessa* decision covers this case ?

Mr. SCOTT : Yes, my Lord.

The PRESIDENT : That means that the Chartered Bank were only pledgees and that the ownership of the goods was in German subjects. These goods, therefore, will be condemned.

Mr. HILL said he ought to mention that the Chartered Bank's affidavit suggested that, in addition to the items one to six, there was another parcel of strawbraids in which they had a similar interest. With regard to that parcel a claim had been put in by a Swiss firm, Messrs. Georges Meyer & Co., who claimed to be the owners of the goods.

Mr. SCOTT said that the documents in the hands of the bank showed that money was advanced by them in respect of this item as in the other cases, and on the same footing. The facts now presented to the Court were unknown to him.

Mr. L. W. J. COSTELLO said he appeared for Messrs. Georges Meyer & Co., of Wohlen, Switzerland. The goods, according to his instructions, were to be forwarded to Bordeaux. He asked that the case, so far as this



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particular parcel was concerned, should be adjourned for three weeks. In the meanwhile, in all probability they would be able to satisfy the Procurator-General as to his clients' claim.

The PRESIDENT : I will adjourn it for a fortnight.

Mr. SCOTT, reverting to the Chartered Bank's claim in respect of the first six items, said that the facts had been accurately stated by his learned friend, but there was one fact he did not mention—the transaction originally in connection with these consignments took place before the war. The peculiarity of the transaction, distinguishing it from that in the case of the *Odessa*, although on the facts he did not think his Lordship would treat it as a distinction in principle, was that the Chartered Bank advanced the whole invoice price of the goods. They had the bills of lading endorsed to them at the outset before the war, and by the bills of lading the consignee took possession when the goods left the ship's tackle, and, further, the freight was prepaid. But the bank, if they were not reimbursed on the acceptance of a draft by the persons on whom the draft was drawn, would ultimately sell, and if they made a loss on the sale would recover the balance from the drawer; or *vice versa*, if there was any surplus, would hand it over. Therefore, his Lordship would, no doubt, regard the bank merely as pledgees, although they might have the whole property in the goods for the time being.

Another fact was that the goods were landed, and, as he submitted, received by the servants or agents of the bank the day before they were seized by Government authorities. That gave rise to a question in a very direct form, which, from one aspect, his Lordship dealt with in the case of the *Roumanian*.\* But his Lordship would

\* (1914), ante, Vol. I., page 191; on appeal, post, in this Volume.

probably be of opinion on this point that, although the goods were in the possession of the consignees, as they were still in a warehouse within the confines of the port, they were subject to maritime capture.

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Another question he desired to keep open, but upon which his Lordship had also given a decision in another case, was that the goods were carried by a British ship and were exempt from capture.

Mr. HILL said that he could not assent to the view his learned friend had put forward as to the facts. All the bills of lading provided for delivery in London, Antwerp or Hamburg, to order, but, according to a marginal note on the bills of lading, the goods were to be landed at Hamburg if no option was declared. No option was declared in favour of London, and the ship, he submitted, still had an interest in the goods, although they were in warehouse. It was not a question of option, because as soon as the ship arrived the Crown intervened.

Mr. SCOTT: I do not think there is any evidence that the Crown intervened as soon as the ship arrived in London.

Mr. HILL: It intervened on September 30.

Mr. SCOTT: Yes, that is just my point.

Mr. HILL said that it did not matter, because the transit which the ship undertook to carry out was a transit to Hamburg, and when the goods were put out in London that did not end the transit. Under this sort of bill of lading it was no delivery to the consignees. It was simply a step in the process of the carriage which the ship had undertaken to effect, namely, by the ocean ship to London, and by the home trade ship to Hamburg.

The PRESIDENT: You say that the goods were discharged in order that they might be re-shipped, but that



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there never could be re-shipment in view of the war ? Do you, Mr. Scott, still assert that the goods were delivered by the shipowners to agents of the bank ?

Mr. SCOTT : Certainly.

The PRESIDENT : I must have proof of that.

Mr. SCOTT said that, having regard to the bill of lading giving an option for delivery in London, it was obvious. In the circumstances, war having intervened, the ship-owners would assume to exercise the option.

The PRESIDENT : I must have evidence on that matter, because I must determine the facts for the Appellate Tribunal, in the event of an appeal.

After some further discussion it was directed that this part of the case should stand over for a week in order that evidence might be forthcoming as to the circumstances of the discharge into the warehouse ; as to whether there was complete delivery to the bank ; and as to whether there was any exercise of the option for delivery in London.

The PRESIDENT added that he did not anticipate that any act was done by the bank at all by way of exercising any option.

Mr. SCOTT : I do not think that there was a declaration of the option for delivery in London, but that the bank received possession I think is a fact.

The PRESIDENT : It may not make any difference in law, but I must find the facts. I adjourn the matter for a week.

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Mr. LESLIE SCOTT : May it please your Lordship. The detailed facts with regard to the shipment of the 195 bales of strawbraid from Tsingtau, upon which your Lordship granted an adjournment, have been ascertained and put

into the form of two documents—one a statement of fact by the warehousemen, who are acting on behalf of the Chartered Bank of India, the other an affidavit on behalf of His Majesty's Customs. May I just recall to your Lordship's recollection the particular six items? The Chartered Bank advanced, in Tsingtau, the whole of the invoice price of the goods. The goods were shipped under a bill of lading providing for alternative destinations, Hamburg being included, and London being included, in the destination. In the event of the shipment being delivered at London an extra 1s. freight was payable. One of the questions about which there seems to be a little doubt was how or when the option for London delivery was exercised.

The PRESIDENT: To whom did the Chartered Bank advance the money?

Mr. LESLIE SCOTT: To the shippers—for this purpose alien enemies.

The PRESIDENT: They are Arnhold, Karberg & Co.?

Mr. LESLIE SCOTT: Yes. The facts disclosed that the Chartered Bank, before the arrival of the ship, instructed Messrs. Smith & Son, a firm in London, to obtain delivery of the goods in London from the ship, and pay the freight due for London delivery. They sent the bills of lading to Messrs. Smith. Messrs. Smith took the bills of lading to the P. & O. offices and paid the additional freight due for London delivery, and the Chartered Bank repaid the amount of that freight to Messrs. Smith. Consequently the goods were landed by the P. & O. Company on the quay, and the goods were taken from the quay by Messrs. Smith. They have been held since that time—from the time of delivery—and are still held by Messrs. Smith in their warehouse to the order of the Chartered Bank. The additional

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facts appear in the affidavit on behalf of His Majesty's Customs.

The PRESIDENT : I have not got these new documents.

Mr. MAURICE HILL : I would refer your Lordship to Messrs. Smith's affidavit, which shows that throughout Messrs. Smith held, not to the order of the Chartered Bank, but to the order of the Customs, who had given permission for the goods to be taken by Messrs. Smith to their warehouse on an undertaking that they would hold to the order of the Customs. That is so stated, and I will show it by the documents.

The PRESIDENT : Is the statement of Messrs. Smith & Son agreed ?

Mr. MAURICE HILL : Yes, my Lord.

Mr. LESLIE SCOTT : Yes, my Lord.

(1) On the 28th September, 1914, the day previous to the arrival of the s.s. *Syria* in London, the representative of the Chartered Bank of India, Australia, and China handed to us bills of lading relative to 20, 30, 52, 49, 20, 25 and 19 bales respectively of strawbraid, with instructions to us to land and warehouse these goods in our warehouses on their account and to their order; and on that day we gave an acknowledgment of the receipt of the bills of lading to the Chartered Bank of India, which is hereto annexed and marked 1.

The receipt is in these terms (*handing it in*) :

Dear Sir,—We beg to acknowledge with thanks receipt of bills of lading for the under-mentioned goods.

The PRESIDENT : That is 215 packages.

Mr. LESLIE SCOTT : The last 19 bales are not subject to discussion to-day. They are the item in respect of which one of my learned friends behind the Bar said that he

appeared on behalf of French or Swiss parties, who were interested in this standing over.

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Mr. MAURICE HILL : No, it is not even that—it is quite a different mark.

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Mr. LESLIE SCOTT (*reading*) :

(2) On the 29th September, 1914, on the arrival of the s.s. *Syria*, we obtained the usual release for these goods from the Peninsular & Oriental Steamship Company, and we on that day received from the Chartered Bank of India the sum of £6 11s. 10d., the amount of the freight due on these shipments for London delivery to the Peninsular & Oriental Steamship Company as per their receipted account dated 29th September, 1914, which is hereto annexed and marked 2.

The PRESIDENT : In what capacity were Messrs. Smith acting ?

Mr. LESLIE SCOTT : As warehousemen, my Lord.

The PRESIDENT : But why was freight paid to them ?

Mr. LESLIE SCOTT : Because they paid it to the P. & O. Company either directly or indirectly. Your Lordship will remember that the whole of the voyage freight had to be paid at the port of shipment, and this is just the additional London freight. These two paragraphs, I submit, show the exercise of the option for London delivery, which was the liberty reserved to the holder of the bill of lading.

The PRESIDENT : When do you say it was exercised, and by whom ?

Mr. LESLIE SCOTT : By the Chartered Bank, the holders of the bills of lading, either on September 28 or 29; it depends on which day Smith's, as their agents, actually spoke to the P. & O. Company :

(3) On the 30th September, 1914, when the goods were lying ashore at the Royal Albert Docks prior to delivery to our lighter a stop order was put on the goods by His Majesty's Customs.



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The PRESIDENT : What does " lying ashore at the Royal Albert Docks " mean ?

Mr. LESLIE SCOTT : On the quay.

The PRESIDENT : Were they to be moved into lighters ?

Mr. LESLIE SCOTT : Yes, my Lord. The next paragraph shows what that means. The goods stayed on the quay for some time, and the final delivery of them at Smith's, which is called landing them at their warehouse, was by October 12.

Mr. MAURICE HILL : It began on the 5th, and went on

Mr. LESLIE SCOTT : Then Smith's landing account is Document No. 3, where you see both the weights and the measurement—there is nothing else in that. Then :

(5) On the 19th October, 1914, we received notice that the goods were seized as Prize, and we communicated this information to the Chartered Bank of India in a letter dated the 19th October, 1914, which is hereto annexed and marked " 4." (6) On the 9th November, 1914, a writ was attached to these goods, and we also duly advised the Chartered Bank of India of this fact by a letter which is hereto annexed and marked " 5." (7) On the 20th January, 1915, at the request of the Chartered Bank of India we wrote a letter to them that the goods were lying on our premises to their order subject to war detention, which letter is hereto annexed and marked " 6."

The PRESIDENT : Was that a Prize seizure ?

Mr. LESLIE SCOTT : Yes, my Lord. Then :

(8) From the time that we received instructions from the Chartered Bank of India to land these goods, and receive the goods from the P. & O. S. Company we have acted on behalf of the Chartered Bank of India and no one else, and, subject to the seizure on behalf of the Crown, held the goods on behalf of the Chartered Bank of India and of no one else.

Therefore, that statement is that the goods were held entirely for the Chartered Bank, subject to any inference of fact or law that your Lordship may draw, first of all, as to the effect of the stop order, and then of the seizure as Prize.

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Will your Lordship take the affidavit of Mr. Chaloner, the Officer of Customs? He says :

(1) The 195 bales of strawbraid described in the bills of lading exhibited to my affidavit dated 30th October, 1914, the said exhibits being numbered 1 to 6, were first placed under detention on the 5th October, 1914.

(2) Prior to that date, that is to say on the 2nd October, an undertaking had been given to the Surveyor of His Majesty's Customs at the Royal Albert Docks that in consideration of these goods (among other goods) being permitted to be warehoused at Smiths' Wharf, they would be held to the order of the Collector, London Port. . . .

(3) To the best of my belief it is necessary before goods are removed from a ship or premises owned or controlled by the Peninsular & Oriental Steam Navigation Company, Limited, into the possession of other parties that a "release" should be issued by the shipowners or brokers. Such "release," however, would not remove or avert any stop which may have been or may be placed on goods by the Officers of His Majesty's Customs.

(4) On the 19th October, 1914, the Surveyor at the Customs and Excise Office at 21, Queenhithe, E.C., certified that the goods were still on hand at Smiths' Wharf, and that the proprietors had been instructed in writing that such goods must not be removed without the authority of the Admiralty Marshal.

My submission is that on these facts the goods were in possession of the Chartered Bank both on board the ship and on land; that they had such a property in the goods as even on board the ship would in law prevent their being condemned as prize; and that even if your Lordship—following the *Odessa*\*—decides contrary to that contention, yet the goods, having been in their possession on land, could not be seized as prize.

\* (1914), ante, Vol. I., page 301; on appeal, post, in this Volume.



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The PRESIDENT : I decided that point too, did I not ?

Mr. LESLIE SCOTT : By your Lordship's courtesy, I was going to ask whether it is any use my attempting to argue, or whether your Lordship considers these facts covered by previous decisions. My own view is that your Lordship's previous decisions have covered them. The *Roumanian*\* was the oil case.

Mr. MAURICE HILL : Both these points were decided in the *Roumanian*, and the question of the British ship was decided previously. That was Mr. Balloch's case, or what we have referred to as Mr. Balloch's point.

Mr. LESLIE SCOTT : There were three points. The three cases were the *Aldworth*,† the *Odessa*, and the *Roumanian*, and those were three cases the decisions in which, in my view, cover this case.

The PRESIDENT : Is the point new relating to the exercise of the option ? That did not prevent them from being pledgees—I suppose that is the point ?

Mr. LESLIE SCOTT : It did not prevent their being pledgees. It may be, in this case, they were also mortgagees ; I do not know.

Mr. MAURICE HILL : It is important to get the facts of this case quite right in case it goes any further, and I submit that this further information shows that this case is rather a stronger case than the *Roumanian* against the claimants, because here the goods never were in anybody's possession but that of the carrier, except under an undertaking to hold them for the Customs. In the *Roumanian* part of the goods got out into the hands of the warehousemen before the Customs came along, but if

\* (1914), ante, Vol. I., page 191 ; on appeal, post, in this Volume.

† (1914), ante, Vol. I., page 137.

you take the dates here they are these : On September 28 the Chartered Bank handed Smith, at Smith's Wharf, the bills of lading, with instructions to land and warehouse the goods. On September 29 the ship arrives at the Royal Albert Dock, and no doubt it would go to the appropriated berth. On the same day, September 29 —

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The PRESIDENT : Do you admit that this was in exercise of the option for London ?

Mr. MAURICE HILL : Yes, I should think it was, now we have got the facts. Of course, when we were here before we were not clear whether they had the right to exercise the option, or whether they had done so, but I think the position was that they were pledgees who had not been paid, and therefore I imagine they had the right to exercise the option, and I think their paying the additional London freight shows the exercise of the option. Therefore, one may assume that the goods were German goods, as to the property in which the Chartered Bank were pledgees, and they were to be delivered in London. We have got September 29 as the date when the ship arrived. On the same date Smith's got from the P. & O. Company a release, and that I suppose means that freight was paid. On September 30 the stop order is put by the Customs on the goods, and the goods are then lying on the P. & O. quay. On October 2—this is the next step before anything is done—Smith's give the Customs an undertaking (which is Exhibit No. 1 to Mr. Chaloner's affidavit) that in consideration of the Customs permitting the goods to be removed from the P. & O.'s custody to Smith's custody, Smith's will hold them to the order of the Customs. That is to say, they will allow the goods to be shifted about, but the position of the Crown will not be affected.

The PRESIDENT : It would not have mattered if they had been brought to London ?



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Mr. MAURICE HILL : No. Then on October 15 the Customs put the goods under a formal order of detention, and on the 16th the Customs give formal notice to the P. & O. Company. The P. & O. Company reply that on the 5th the goods had already been delivered to Smith's on Smith's undertaking.

By October 12 Smith's had already got all the goods in the warehouse, and the rent and charges began to run from October 6. On the 19th a notice of seizure as prize is given to Smith's, and by Smith's to the Chartered Bank, so that the goods are continuously in the hands of the carrier, the P. & O. Company, up to a point, and from that point they are in the hands either of the carrier or of Smith's under a stop by the Customs, and an undertaking that they shall be held by the Customs. That really makes it a stronger case than the *Roumanian*\* on the facts.

### JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*) : The facts have been correctly stated by Mr. Maurice Hill in the observations which he has made, and admitted quite candidly and fairly by Mr. Leslie Scott. Upon these facts, if my previous decisions are right, the claimants have failed to establish their claim. I must, of course, until those decisions are reversed, follow them; and, therefore, I strike out the claim of the claimants, and condemn the goods claimed as good and lawful prize.

Mr. LESLIE SCOTT : This case, of course, is even a stronger case on behalf of the banks than the case of the *Odessa*, † where the whole of the invoice price was not

\* (1914), ante, Vol. I., page 191; on appeal, post, in this Volume.

† (1914), ante, Vol. I., page 301; on appeal, post, in this Volume.

advanced, and here there is the additional fact that the bank exercised the option for London delivery.

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The PRESIDENT : Do you want liberty to appeal ?

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Mr. LESLIE SCOTT : I think the correct order would be to admit to appeal.

The PRESIDENT : Leave to admit an appeal is what is generally given.

Mr. LESLIE SCOTT : I am told by my learned junior that that is the order that is made—it is a mystic rite of this Court which I admit frankly I do not understand.\*

Mr. MAURICE HILL : One does not know what is meant by admitting to appeal, but, according to the Rules, an application is to be made to the Court to admit to appeal.

The PRESIDENT : Whatever is necessary to enable you to pursue your appeal you may have.

Mr. LESLIE SCOTT : I am obliged to your Lordship.

Mr. MAURICE HILL : Before my learned friend goes, there is just one thing I would like to mention. There is no question about these first six items in the writ, and they are governed by what your Lordship has said. There was item No. 10, which has been included in the Chartered Bank's claims, for another parcel of strawbraids, but the Chartered Bank have said that they have no documents and no information as to the marks. There were Messrs. Georges Meyer & Co., of Switzerland, who put in a claim in respect of these, and that was to stand over till next Monday. Therefore, the judgment so far does not apply to that item.

\* [Order XLIV., Rule 2, of the Prize Court Rules, 1914, is as follows : "Applications to the Court for the admission of an appeal as of right, or for leave to appeal, shall, if not made at the time that the judgment appealed from is delivered by the Court, be made by motion within seven days from the date of such judgment, and the applicant shall give to the opposite party notice of his intended application."—ED.]



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The PRESIDENT: The decision I have just given only affects the first six items—the 195 bales.

#### CLAIM OF MESSRS. MITSUI & CO.

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Mr. MAURICE HILL, K.C., dealing with the claim of Mitsui & Co., of Tokio, in respect of 3,600 bags of zinc ore sent by them to the Metallgesellschaft, of Frankfort, said that, so far as the affidavits and documents disclosed, it would appear there were Mitsui & Co., of Hamburg, who had got a contract with the Metallgesellschaft, of Frankfort, by which they sold a large quantity of ore to the Metallgesellschaft on a c.i.f. price to Antwerp.

The bills of lading were sent by the Tokio house to the Hamburg house, and he submitted that at the time of the shipment the property belonged to the enemy absolutely. There was a representative of Mitsui & Co. in London in November and December, and yet no affidavit by that gentleman in regard to the matter had been put forward.

Mr. ROCHE, K.C. (for the claimants), said that the gentleman in question was in Court, and he could clear up several of these matters.

Mr. HILL said that the affidavits which had been received did not show that the Mitsui Hamburg house was merely an agent for the Tokio house. If Mitsui, of Tokio, were carrying on business in Hamburg, then they were *qua* that business an enemy. It was curious that, although the gentleman referred to by Mr. Roche was in London about the time of this matter arising, there was no information as to what Mitsui, of Hamburg, were doing, even after Japan and Germany became at war, on August 23.

It was not known what had become of the bills of lading except that they were sent from Tokio to Hamburg. Upon the documents before the Court as they stood the matter

was not only one of great suspicion, but, he submitted, showed that the property passed from Tokio to the Hamburg house of Mitsui for the purpose of carrying out the sale to the Metallgesellschaft, who were entitled to have the whole of the shipment of this order. Either the property still remained in the Hamburg house, or they had transferred the bills of lading to the Metallgesellschaft. Certainly it was not quite clear, and it was unfortunate that it was not quite clear. It looked, at any rate, as if the Mitsui Company were carrying on enemy business *qua* their Hamburg business up to August 23. At present all he could say was that these goods were enemy goods.

Mr. ROCHE said that the position was not a little ironical. This firm of Mitsui had been hunted from Hamburg, and had to leave to escape imprisonment, because they were enemies of Germany. It was a little hard to say in such a case that this firm was an enemy firm.

From about August 19 the claimants had not been able to get a single document from the office of the firm at Hamburg. Perhaps the Germans were more angry with us now, but at the time of the outbreak of war with Japan they were perhaps more angry with Japan for what they considered was their treachery and impudence in daring to take part in this struggle. But in fact the goods were not the property of Mitsui, of Hamburg, but of Mitsui, of Tokio.

The firm of Mitsui were a mining house, a banking house, a shipping house, and a general trading house. They were divided into three departments, the Mitsui Bank, the Mitsui Company, Ltd., and the Mitsui Mining Company. These were separate companies, all controlled by the partners.

The contract was not an ordinary c.i.f. contract. If it were, his Lordship's decision in the *Miramichi*\* would

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apply. It was a contract for delivery at the port of destination, and a c.i.f. price was mentioned only for the reason that there was a sliding scale applied to the freight, so that if the freight rose there was to be an adjustment.

The delivery and payment were at the port of destination, and in ordinary circumstances the property would not pass until the place of delivery was reached, namely, in this case, Antwerp.

The sole relationship of Messrs. Mitsui, of Hamburg, to these goods was as consignees for sale. Further, the law as stated in the headnote to the case of the *Gerasimo*\* was conclusive with regard to this case :

The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity he is to be treated, for the purposes of trade, as the subject of the Power under whose dominion he carries it on, and as an enemy of those with whom that Power is at war.

That Messrs. Mitsui had done literally as fast as their legs would enable them.

Even assuming, contrary to the facts, that these goods would have come, if war had not supervened, into the hands of Mitsui & Co., then of Hamburg, so as to give them an ownership, at the time when the goods were seized Messrs. Mitsui had ceased to be of Hamburg, and had ceased to be in any way alien enemies of this country. It was an *a fortiori* case to the case of the American shippers and the *Miramichi*.

Mr. KOSHIM TDZUKA was sworn and examined by Mr. C. R. Dunlop as follows :

\* (1857) 11 Moore P.C. 88; 2 E.P.C. 577.

Mr. DUNLOP: Were you the assistant manager of Mitsui & Co.'s Hamburg office?—Yes.

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And were you in Hamburg until August 18?—Yes.

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Was war between Japan and Germany at that time imminent?—Yes, so far as I remember. His Majesty the Mikado's Government had given an ultimatum on the 19th, which expired on the 24th.

And, in consequence, was your office closed in Hamburg?—Yes.

On what date was your office closed?—I am not quite sure. I left on the 18th, and the German Government seized all the property on the 19th, and the office was closed.

Why did you leave on August 18?—Because we were informed by the Consul that we were to leave as early as possible.

Did you come to London, and did your manager go to Switzerland?—No, he stayed in Hamburg, and he was captured on August 19 or 20—I am not quite sure which—and he was thrown into prison, and after he was let out he was in a private house.

The manager was arrested on August 19?—The 19th or the 20th.

And was afterwards released and went to Switzerland?—Yes, he was staying in his private house one month or two months, and later on he went to Switzerland.

The PRESIDENT: What was the staff in Hamburg—how many people were in the office?—Six Japanese subjects and about 15 German subjects.

German clerks?—Yes.

Do you speak German?—Yes, I can speak German.

Mr. DUNLOP: The *Syria* bill of lading is dated July 23. When in the ordinary course of business would shipping documents have reached Hamburg?—It would take in the



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ordinary course some three weeks, or, say, 18 days. Very often they would arrive in two weeks, and very often two or three days later.

The PRESIDENT : Coming overland ?—Yes.

Mr. DUNLOP : When would the documents have arrived in the ordinary course of business in this case ?—By the middle of August.

Did they ever reach you ?—No—not only from Japan, but also from London—they never reached our hands.

What is the position of your Hamburg office with relation to these goods—are you the buyers or the selling agents, or what are you ?—No : this property belongs to the Mitsui Mining Company, and we receive commission of  $2\frac{1}{2}$  per cent. on making a transaction to deliver the cargo. Our Mining Company is only occupying the office in Japan. They cannot make a contract with a German firm, and, therefore, we make the contract.

The PRESIDENT : Do you say that you were the middle men ?—Yes ; we make the contract on behalf of the Mitsui Mining Company.

Mr. DUNLOP : You are the intermediary ?—Yes.

And you receive a commission of  $2\frac{1}{2}$  per cent ?—Yes,  $2\frac{1}{2}$  per cent.

The PRESIDENT : Then it is not a branch of the Tokio house ?—No ; this is rather complicated. There are three departments—the Mining department, the Banking department, and the Mitsui Trading Company. Those three are controlled by the Mitsui family. The Mitsui Trading Company have offices in Tokio and Kobe, and all over the world, in all important towns. For instance, the Hamburg branch depended on the London branch, that is to say, the London manager controlled the Hamburg branch.

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The PRESIDENT : Who gets the  $2\frac{1}{2}$  per cent. commission ?  
---Our Hamburg office.

But who gets it ?—The Hamburg office gets  $2\frac{1}{2}$  per cent. for the Mitsui Mining Company.

Who are the people into whose pockets the  $2\frac{1}{2}$  per cent. goes ?—The branch at Hamburg.

You are not the Mitsui—you are not one of the family ?  
—No, I am only the employé of the Mitsui Company.

Is there one of the Mitsui family in Hamburg ?—No, none of the Mitsui family stayed in Hamburg.

The Hamburg branch made a lot of money, I suppose ?  
—Yes ; but at the end of a certain time that would be transferred to the head office of the Mitsui Company in Tokio.

Mr. DUNLOP : After payment, I suppose, of the office expenses and wages ?—Yes ; the net proceeds would go to the account of the Mitsui Company, Ltd., at Tokio.

You know the ordinary course of business in connection with these zinc ore shipments that are consigned to you at Hamburg ?—Yes.

I want you to explain to us the ordinary course of business ; we know in this particular case the documents never arrived ?—No.

But supposing there had been no war and no trouble ?—Yes.

The goods were shipped by the Mitsui Company ?—Yes.

And the Mitsui Company in Japan discount drafts with the bank in Japan ?—Yes.

The PRESIDENT : What bank ?

Mr. DUNLOP : I think the Hong Kong and Shanghai Bank, or the Deutsch-Asiatische Bank. When the bank discounts the draft, the Japanese house hands to the bank in Japan the bill of lading and the policy of insurance ?—Yes.



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Is the draft drawn upon your office in Hamburg ?—Yes, upon the Mitsui Company's branch in Hamburg.

Does the Japanese Bank then send the shipping documents and the draft to Hamburg ?—They send the documents to their branch in Hamburg.

The branch bank of the Hong Kong and Shanghai Bank, or the Deutsch-Asiatische Bank, as the case may be ?—Yes.

The Hamburg Bank, then, does it present the drafts for acceptance ?—Yes.

And do you accept the drafts against bills of lading ?—Yes.

And is that before the goods arrive in the ship ?—Yes ; the goods would take about two months to arrive.

All the documents you receive via Siberia ?—Yes, in the course of about two weeks.

On the ship's arrival, what do you do ?—On the ship's arrival we send our documents to the Metallgesellschaft against the payment of the 75 per cent. under the contract.

The PRESIDENT : What becomes of the accepted bill of exchange ?

Mr. DUNLOP : The Hamburg office accepts the draft, and the 75 per cent. which they get later on goes towards the payment of the draft when the draft falls due.

The PRESIDENT : What becomes of the bill of exchange ?

Mr. DUNLOP : After you have accepted the bill of exchange you hand it back to the German Bank ?—Yes, the accepted draft will be returned to the German Bank, and we receive the documents.

The PRESIDENT : So it is handed back to the branch bank in Hamburg, is it ?

Mr. DUNLOP : Yes.

The PRESIDENT : What do they do ?

Mr. DUNLOP (*to the witness*) : Then they present it for payment when it matures ?—Yes.

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The PRESIDENT : Against you ?—Yes, against the Mitsui Company, of Hamburg.

Mr. DUNLOP : And you pay it out of the money you receive when the draft matures ?—To the bank.

Yes; you pay to the bank out of that money—do you pay the amount of the draft ?—Yes, because we have generally an account with a certain bank in Hamburg. Therefore, at maturity we transfer our credit to the bank.

Mr. DUNLOP : When the ship arrives you present the bills of lading to the Metallgesellschaft for their taking up the documents against payment of 75 per cent. of the price ?—Yes.

Mr. MAURICE HILL : He did not say that about the ship—you put that in.

Mr. DUNLOP : What happens when the ship arrives with the zinc ore ?

The PRESIDENT : What would have happened if this shipment had arrived ? — If this ship had arrived, then the Metallgesellschaft would have had to pay 75 per cent. against the invoice and would have received the bills of lading.

The PRESIDENT : Have the Metallgesellschaft an office in Hamburg ?—No, they have only agents.

Mr. DUNLOP : And it is not until you are paid the 75 per cent. that you transfer the bills of lading to the Metallgesellschaft ?—We transfer the bills of lading only against payment.

On arrival of the ship ?—Yes.



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The PRESIDENT : In whose favour is the bill of lading usually made out ?—To order.

To order of Mitsui, Tokio, is it ?—The cargo will be shipped from Kobe through the branch of Mitsui at Kobe.

Mr. DUNLOP : The Mitsui Company at Kobe are the shippers and the goods are deliverable to their orders ?—Yes.

The PRESIDENT : Do they endorse the bill of lading to you, to the Hamburg branch ?—Yes.

Specially or generally ?—Generally.

They endorse it simply ?—Yes.

Then it is an open endorsement ?—Yes ; when we deliver to our buyer we must endorse it.

Mr. DUNLOP : Against payment of the 75 per cent ?—Yes.

Mr. MAURICE HILL (*cross-examining*) : I suppose generally the shipping documents arrive some time before the ship reaches Antwerp ?—Yes.

As soon as you get the shipping documents, do you then go and see the Metallgesellschaft with them ?—No, not at the time. When we make a shipment our Kobe branch gives us previous notice that they have shipped so much by a certain steamer, and about what time the steamer will arrive ; therefore, when receiving the document, we do not communicate until two or three days before the arrival of the steamer, when we give notice.

Two or three days before the expected arrival of the steamer you give notice to the Metallgesellschaft ?—Yes.

Is it then that they pay you 75 per cent. against the shipping documents ?—Yes.

Mr. ROCHE : My learned friend agrees that if the goods do not arrive they would be entitled to their money back ?

Mr. HILL : Of course. They have got the shipping documents, they go to the ship, and they take delivery from the ship—the Metallgesellschaft ?—Yes.

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The PRESIDENT : And they pay you generally before the ship arrives ?—We can communicate by telephone ; therefore, there is not any difference between the arrival and the payment ; it is about the same time that they pay.

Mr. MAURICE HILL : It is the Metallgesellschaft who take the shipping documents down to the ship and get delivery of the goods ?—Yes.

And they do not get the shipping documents from you until they have paid you 75 per cent. of the price ?—No, they cannot receive the documents before they have paid.

Till then you hold the bills of lading endorsed generally by Tokio to you ?—Yes.

The bill of lading has come to you from Japan ?—Yes.

With a general endorsement of the shippers ?—Yes.

That is of Mitsui in Japan ?—Yes.

And then, when you are going to transfer them to the Metallgesellschaft, you specially endorse them to the Metallgesellschaft ?—Yes.

That is as it would go through in the ordinary way ?—Yes.

Do I understand you cannot say when the bills of lading of this particular shipment reached Hamburg ?—No, they have not reached. It was expected they would reach about the middle of August, but they did not arrive.

You mean that you heard nothing about them ?—No.

The PRESIDENT : They would have to come through Russia ordinarily ; they would have been sent in the first instance by the Trans-Siberian Railway that goes through Russia, and, of course, they may never have reached.

Mr. MAURICE HILL : They may have started to go that way.



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The PRESIDENT : Yes.

Mr. ROCHE : He has said that he was not getting his news from London ; he was not getting his London mails properly at that time.

Mr. MAURICE HILL : What happened to the manager of your Hamburg branch ?—He was staying in a private house watched by a German policeman.

He was the gentleman who was arrested ?—Yes.

I suppose you have heard that through some letters ?—I have seen one of the letters which he wrote to our branch in New York because he could not send any letters to London.

Of course, as far as you yourself are concerned, you do not know anything about what your Hamburg branch has been doing since you left on August 18 ?—So far I know that our Hamburg house is entirely closed and no business transactions have been done.

The PRESIDENT : Are they big offices of yours in Hamburg ?—Yes, pretty big.

With safes there ?—Yes, with safes.

A lot of money ?—We do not keep so much money in cash—we have some.

You bank it, I suppose ?—Yes.

Did you have a large balance in the bank on August 18 ?—No ; at that time we had not so much of a balance to our credit.

You took it out ?—No ; we could not take it out from the end of July.

You mean that they would not let you take any of your money from the German bank from the end of July ?—Yes. I am not quite sure, but I think Germany declared a moratorium on August 2 ; at any rate at the end of July or the beginning of August they declared a moratorium, and we could not get any money from the

bank—I think only a certain limit of 100 or 200 marks for daily or monthly expenses.

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Mr. ROCHE : Preliminary measures were taken as early as July 31.

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The PRESIDENT : The declaration of war was by Japan, and not against Japan, was it?—No, Germany declared it, only we gave the ultimatum.

Mr. MAURICE HILL : I suppose up to the time you left on the 18th you were carrying on business?—Till the 18th, yes. Of course, we could not receive payment of money.

You got your money?—

The PRESIDENT : He got something for current expenses.

Mr. MAURICE HILL : Up to the 18th, if you got a bill of lading for ore under one of your contracts with the Metallgesellschaft, I suppose the Metallgesellschaft were glad enough to take the ore?—By that time the moratorium had been issued, and, therefore, we could not accept payment.

The PRESIDENT : You see, Mr. Hill, the vessel was not due for five or six weeks.

Mr. MAURICE HILL : No, it was not.

Do you think if you had gone on the 16th—that was before the Japanese ultimatum—with the documents if they had arrived on the 16th, and you had taken them to the Metallgesellschaft, that you would have got the money?—No, I do not think so, because the steamer had not arrived.

The steamer was not due to arrive for a long time?—No.

Mr. ROCHE : I have nothing to ask him, my Lord. I submit the facts are conclusive, and they show that this gentleman is perfectly honest.



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The PRESIDENT (*to the witness*) : Are you now living in London?—Yes.

And employed in the Mitsui office here?—Yes.

Mr. ROCHE : It is abundantly clear that as regards the Metallgesellschaft—so far as they are concerned—no property can pass to them until they take up the documents, which is on or about the arrival of the ship. In law I do not think my learned friends would differ from me as to that. Moreover, if the Metallgesellschaft chose to ante-date the taking up of the documents the day before the arrival of the ship, and it did not arrive, they would get their money back again. But that does not apply here, because we have not got within a week of the arrival of the ship. Therefore, there can be no question that the Metallgesellschaft are not the owners of these goods, apart from any question of the Hamburg office having ceased to exist two months before the date of the seizure of this property.

The PRESIDENT : When did the vessel sail from Japan ?

Mr. ROCHE : The bill of lading is dated July 23.

Mr. MAURICE HILL : It was before the end of July.

Mr. ROCHE : These are pre-war matters and therefore well within your Lordship's decision in the *Miramichi*.\* Of course, the contract was long before the war, and the shipment before the war. Under those circumstances it is clear that no property had passed to the Metallgesellschaft, nor had any property passed to the Mitsui branch at Hamburg. Of course, your Lordship knows that under the Bills of Lading Act, 1855, mere endorsement of the bill of lading, even if special, does not pass the property to the endorsee—it must be such endorsement as is intended to

\* (1914), ante, Vol. I., page 157.

pass the property. The case of *White & Co. v. Furness, Withy & Co.* [1895], A.C. p. 40, decides that to agents who hold such an endorsement of the bill of lading no property passes, and it is quite clear that the position of the Hamburg house is that of mere agents in the matter—consignees for sale as agents to account to their principals for the proceeds, taking a commission of  $2\frac{1}{2}$  per cent., which after office expenses have been paid out of it goes back to Japan to the owners of the business. That is the first point with regard to the Mitsui house in Hamburg—that the property never passed. The other point is that if it had, they had left Hamburg. So far as they could they left Hamburg, and the rest of them, or the most important part of them, in the person of the manager, was in prison. That is a state of things which is hardly compatible with continuing to carry on business as alien enemies in Germany.

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The PRESIDENT : As a matter of curiosity, supposing the property had passed to them on the 24th, before the 17th if you like—say on the 16th—and they were driven out of Hamburg on the 18th, who had the property in the goods ?

Mr. ROCHE : At the time of the seizure the property would be in them, but they would not be alien enemies—that is the answer. They would be allies of this country who had given up, so far as they could give up by every reasonable effort, their enemy domicile. The reason why a British subject, or a Japanese subject—an allied subject or a neutral subject—is an enemy subject is merely because he is residing there, and if the goods are allowed to get to him they may get to the offensive locality, namely, the enemy country, and his trade is then enriching and benefiting the enemy country.

The PRESIDENT : The basis of it apparently is that the person—whatever his native domicile is—who likes to



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carry on business in the enemy country benefits that country by his carrying on business there, and paying taxes, and so forth?

Mr. ROCHE : Yes, that is the consideration. The enemy country gets the actual goods if they are not stopped, but here, in the case of the Mitsui branch, they had ceased to carry on business because the sub-manager had gone, having taken time by the forelock, the manager was in prison, and the books were impounded.

Mr. MAURICE HILL : This case has again indicated how very unfortunate it is when claimants in this Court do not take the trouble to put their whole case before the Procurator-General at once. It becomes especially difficult when they write letters which when they come into Court they have practically to contradict by evidence. Here is this letter which most positively says that the property is in the Hamburg house.

The PRESIDENT : I do not know who wrote that letter : it may have been written by some clerk.

Mr. MAURICE HILL : This is a letter from the Mitsui Company.

The PRESIDENT : What do they know about the property passing?

Mr. MAURICE HILL : I do not know, but they give the business view of the thing. Your Lordship has the whole of the evidence before you, and I am not going to comment upon it. If the result is that your Lordship can release the property of allies, the Crown will not ask your Lordship to do otherwise, and if that is the fair conclusion from the facts your Lordship will do so,

## JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*) :  
 Mr. Maurice Hill is quite right in saying that it is most desirable in these cases where property is claimed either by British subjects or by subjects of countries who are allies of ours, that they should give the fullest possible information to the Procurator-General, or to those who are interested for the Crown, in order that the facts may be looked into and that the right thing may be done. I attach no blame in this case to anybody. When certain phrases are used in a letter, it is easy to see that the Mitsui house in London were not perhaps appreciating the legal position; and it has become necessary to have this case brought into Court; and I do not think there is very much to deplore in that. The whole situation, as between the Mitsui house in Japan and in London and in Hamburg, has been explained by the last witness, and, according to his evidence—which I have no doubt was perfectly honestly given, and so far as it can be tested by the documents is in full accord with the documents—the property in the 3,600 bags of zinc ore had never passed to an enemy subject at all. The constitution of the Mitsui branch is not fully stated. I daresay the witness was not able to tell us, but as far as I have been able to gather, the Mitsui branch are only acting as agents for the great house—as one of the branches of the business in Japan—and in the ordinary course of things that branch would have dealt with the documents on behalf of the house in Japan as between that house and the Metallgesellschaft, who would become the purchasers. In this case it is quite clear that the documents never have reached Hamburg. Before August 18 nothing had been done by the Hamburg house, nothing could be done by the Hamburg house, in

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relation to these documents; and as far as I have been able to judge, the property in the goods, the subject-matter of this claim, still remains in the vendors, namely, in the Mitsui Company of Japan. I, therefore, order that the cargo of 3,600 bags of zinc ore should be released to the claimants, the Mitsui Company of Tokio, or if they have been sold that the proceeds of sale should be handed over to them.

Mr. MAURICE HILL: They have not been sold.

The PRESIDENT: Very well, then they must be released to the Mitsui Company of Tokio.

#### CLAIM OF THE DEUTSCH-ASIATISCHE BANK.

Mr. MAURICE HILL: In respect of the 135 bags of ground nuts, item No. 11 in Mr. Chaloner's\* particulars, that is the case in which the Deutsche Bank of Berlin, through their London agents, did make a claim, but it is withdrawn, and for it is substituted the claim of the Deutsch-Asiatische Bank.

These people say that they had discounted a bill of exchange against shipping documents—I mean the Deutsch-Asiatische Bank had discounted the bill out there and sent it to the Deutsche Bank for presentation. The Deutsche Bank of Berlin, through their London branch, were at one time the holders as against the Deutsch-Asiatische, but the Deutsch-Asiatische had paid off the Deutsche Bank; therefore, they say now, "We claim in our own right." In one way they put themselves in a greater difficulty, because there is no question that in respect of this transaction, which was carried out at

\*[Mr. Chaloner was employed in the service of H.M. Customs at London.—ED.]

Tsingtau by the Tsingtau branch of the Deutsch-Asiatische Bank, that bank—the claimant bank—is an enemy. So that if they claim, as they say, that the property is in them, it is in an enemy, and it would help my case. The real truth I submit, is that they were pledgees—it is the *Odessa*\* case again—there having been a credit opened and advances made by bills of exchange against shipping documents. Your Lordship will find the shipping documents exhibited to the affidavit. We produced them under notice to the Procurator-General. They have, in fact, been exhibited to an affidavit in support of the claim of the Deutsche Bank. First of all, there is a bill of exchange drawn by Benck & Kretzschmar at Tsingtau on July 25—drawn on Messrs. A. Ruffer & Sons, the London bankers, in favour of the Deutsch-Asiatische Bank for £155 value against 135 bags of ground nuts, the documents attached to be delivered against acceptances drawn under a letter of credit, No. 040211. That letter of credit has never been produced.

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The PRESIDENT : Is that the number of the letter of credit ?

Mr. MAURICE HILL : I thought it was, but I may be wrong. It is the number which appears in the other documents. I thought it was the number of the letter of credit. That bill, as your Lordship sees at the bottom, was endorsed by the Deutsche Bank, Berlin, London Agency, and was presented and marked and noted for non-acceptance. There is another bill for £155.

The PRESIDENT : Were there two transactions ?

Mr. DUNLOP : It is either a second of exchange or it may have been an entirely separate transaction.

The PRESIDENT : It is against these same bags.

\* (1914), ante, Vol. I., page 301 ; on appeal, post, in this Volume.



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Mr. DUNLOP : Then I think probably it is a second of exchange. The invoice is £155, my Lord—it is drawn in duplicate.

The PRESIDENT : The number does not seem to have reference to the letters of credit at all.

Mr. DUNLOP : No, it is in the wrong place, but the first of exchange is the document actually presented—it comes second in the schedule.

Mr. MAURICE HILL : Then there is the bill of lading, which is the next document. It is for a shipment by Benck & Kretzschmar to London to order, and is endorsed by them generally. The next is the certificate of insurance of one of the Berlin companies.

The PRESIDENT : Is it the insurance itself ?

Mr. MAURICE HILL : It is a policy with a German company. Then there is an invoice which says :

For 135 bags of ground nuts, shelled, "screened," bought by order and for account and risk of Messrs. Simson Bros. & Co., London, and shipped per s.s. *Syria* to London to order by Benck & Kretzschmar, against order No. [*blank*] as per telegram of 4th of July, 1914.

It works out at £162 11s. 5d. Then against that they put the note :

Drawn at 4 months' order of the Deutsch-Asiatische for £155 on Messrs. A. Ruffer & Sons, London. Documents against acceptances.

That set of documents shows in fact that the Deutsch-Asiatische—just like the Chartered Bank of India in the first claim we had here—are pledgees of the bill. I would like to say this, that the invoice is a little ambiguous—"bought by order and for account of Simson's." When I first saw that I thought it might be suggested that possibly Benck & Kretzschmar, instead of being sellers, were merely

buying agents for Messrs. Simson, but that referred to order "as per telegram of the 4th of July," and the Treasury Solicitor did procure from Messrs. Simson a copy of the telegrams. I daresay my learned friend will not object to their being dealt with in this way.

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Mr. R. A. WRIGHT : The Deutsch-Asiatische Bank came into the transaction unexpectedly. They came in at the end of last week, because it was only then that the claim of the Deutsche Bank was withdrawn. The Deutsche Bank, having been paid off, have no further interest in the matter. It was for the Deutsch-Asiatische to consider the question as to what they should do.

The PRESIDENT : By whom were the Deutsche Bank paid off ?

Mr. WRIGHT : They were paid off by the Deutsch-Asiatische Bank. I have to prove, first of all, what the domicile and status of the Deutsch-Asiatische Bank is, and I understand that my learned friend is willing to admit that it is—as I can prove if there is a sufficient adjournment—a neutral bank, having its head office in Shanghai. As my learned friend says, this claim will be analogous to the claim of the Chartered Bank of India.

Mr. MAURICE HILL : If my learned friend says that the place of registration of this banking company is Shanghai, I am quite prepared to admit it. It does not put them on the same footing as the Chartered Bank at all ; this particular transaction was by the Tsingtau branch.

Mr. WRIGHT : That, I understand, was common to all these shipments, and I do not wish to contest it. It appears on the face of the documents. That being so, the case will be governed by the documents, subject to the question which your Lordship raised in the first claim here, namely, that the bank may have purchased these documents out-



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right, and got the whole property, and not simply be pledgees. The only other question is one which arises on this invoice, the document on which the matter has proceeded so far. According to the invoices the property appears on shipment to be English property, subject to a lien or whatever the interests are of the bank which advanced the money or financed the transaction. That appears in this invoice—the invoice of the 135 bags of ground nuts bought by order and for account and risk of Simson Bros. & Co., of London. That being so, Benck & Kretzschmar are simply the agents to buy on account of the English buyers. What my learned friend wishes to do now is this—he feels that difficulty; he has not lodged any affidavit—he wishes to read a letter in order to refute that case and show that the property belongs to the alien shipper. That being so, I felt that my client ought at least to have the opportunity of making inquiries if this document is to be contradicted in this way. It may be, of course, that the document is erroneously drawn up, and that it is possible to find out from Mr. Simson the nature of his dealings with Benck & Kretzschmar, and that it was that of a buyer against a seller and not of a buyer and of a foreign agent buying on commission. But the document itself—the invoice—on which the matter has so far proceeded, clearly shows the foreign agent's buying on commission or on some terms for an English buyer.

The PRESIDENT : Messrs. Simson do not claim, at any rate, for themselves.

Mr. WRIGHT : I am instructed that what happened was that the Deutsche Bank, having received the documents, remitted them to Simson. They said they were willing to pay for the bags, but subject to sample. When they went to the warehouse to sample the document they were told that the Customs had taken discharge on behalf of the

Procurator-General, and then, very properly, they refused to buy, and have taken no further interest in the matter. If the goods are English goods, then I submit that they are not property subject to condemnation at all. The mere fact—if it be a fact—that the foreign bank has an interest in these goods would not be a ground for condemnation.

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The PRESIDENT : In whom is the property if they are English goods ?

Mr. WRIGHT : If they are English goods, the property is in Simson.

The PRESIDENT : He does not make any claim.

Mr. WRIGHT : The property is in Simson subject to the interest of the bank. The interest of the bank may be that of a pledgee or of the transferee of an agent's lien, or their interest may be, on another view, that the entire property is in the bank. But I am assuming for the moment that it is a question of financing the transaction, and then the property would be in Simson, subject to the lien or interest of the bank. That being so, Simson, it might be, would not appear here to make any claim ; but the bank would have such an interest, if there was a question of the goods being condemned, as would entitle them to appear before your Lordship and ask that they should not be condemned.

The PRESIDENT : On the ground that they were English goods ?

Mr. WRIGHT : On the ground that they were English goods.

The PRESIDENT : And that, therefore, the goods must be left as they are, and where they are, until the bank may have an opportunity of pursuing any remedies which they may be entitled to.



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Mr. WRIGHT : Assuming the bank to be a pledgee, I take it that in certain events they would have the power of sale. That, I suppose, would be the position ; it would certainly be the position in the case of an unpaid vendor's lien, and I take it that the financing bank here would be in the same position as the holder of such a lien.

The PRESIDENT : Can I release the goods to a man who says, " They are not mine " ? You see, they have been seized. If I refuse to condemn, then the proper order would be that they shall be released ; is not that so ?

Mr. WRIGHT : I submit that the bank have such a property as would justify them in claiming that the goods should be released to them.

The PRESIDENT : Yes, but Simson's do not make any claim.

Mr. WRIGHT : No, because they are in the position of having refused to pay for the goods ; and, therefore, they leave the bank—who have advanced on the goods—to their rights on the security. I submit that the special property of the bank would entitle them to sell the goods, and in this Court to claim a release.

Mr. MAURICE HILL : I told your Lordship that in an invoice like this—which is not an invoice passing between a buyer and seller, but passing between a German in Tsingtau and Messrs. Simson in London—the words, " Bought by order and for account," may be regarded as ambiguous. Therefore, it was thought right to ask Messrs. Simson what the true facts were.

The PRESIDENT : The invoices were not sent to Simson.

Mr. MAURICE HILL : No, the invoice would be attached to the documents.

Mr. WRIGHT : The invoice is one of the ordinary shipping documents. No importance ought to be attached to the fact that it is not sent direct to Simson, because it is meant to go to him as one of the shipping documents.

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Mr. MAURICE HILL : It is one of the necessary ingredients in the agreement by the seller under the c.i.f. contract. He has to get the proper bill of lading, the proper policy of insurance, and to make out the proper invoices and attach them all together to the bill of exchange. If my learned friend insists upon Messrs. Simson putting this matter upon affidavit, he is entitled to insist; but we have got the letter from Messrs. Simson, who gave us copies of the cable which passed; your Lordship will see the cable at the bottom. If my learned friend wants to make inquiries of Simson himself, he is entitled to, but I should have thought we might have disposed of it. Messrs. Simson have written a very fair letter.

The PRESIDENT : You have seen it, Mr. Wright ?

Mr. WRIGHT : Yes, I have seen it. If the Procurator-General had got copies of the letters of credit and of the documents passing between Simson and Benck & Kretzschmar, under which the general course of business was being conducted, then there would have been no difficulty at all.

The PRESIDENT : You apply for an adjournment, do you ?

Mr. WRIGHT : I think I ought to. The invoice on which the matter has proceeded so far is the invoice of the buying agent rendered to his principal. It may be that the invoice does not truly represent the transaction, my Lord. I think I ought to have a week's adjournment in order to think over this matter.



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Mr. MAURICE HILL : I do not resist that.

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Mr. WRIGHT : Then if Messrs. Simson satisfy my clients that what that letter says is a true construction, the matter can be very shortly mentioned to your Lordship, and the same order made as in all these cases that follow the *Odessa*.\*

The PRESIDENT : Very well.

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Mr. MAURICE HILL : The item that stood over is item No. 11, 135 bags of ground nuts, shelled. There was originally a claim by the Deutsche Bank, and that has been withdrawn and a claim put in by the Deutsch-Asiatische Bank for these, as pledgees. The question arose whether, owing to an ambiguity in the invoice, the German shipper at Tsingtau was a seller to a Messrs. Simson, of London, or was a buying agent. We have now got some information from Messrs. Simson to the effect that he was a seller under a c.i.f. sale. That stood over for a week to be ascertained, and now the bank are satisfied. They have now looked into the matter, and they are satisfied that it was a c.i.f. sale, and that the property had not passed to the buyer. Under those circumstances their position is that of pledgees, and their case will be dealt with by the same order as that which your Lordship has just given in the claim of the Chartered Bank of India. There was a question that I was to mention to my learned friend as to whether some information ought not to have been given by him as to whether this Deutsch-Asiatische Bank itself—which, he stated, had its home, or its central place, in Shanghai, and was interested in these transactions, and had been carrying on business at Tsingtau—continued to carry on business at Tsingtau after the declaration of war, because, if it did, in respect of

\* (1914), ante, Vol. I., page 301 ; on appeal, post, in this Volume.

these transactions it was an enemy. That is an important matter which must not be overlooked. It must not be supposed that the Crown are at all receding from the position that any neutral who carries on business in enemy territory may not in respect of that business be an enemy. Among the documents there was one which I think showed that they did carry on business after the declaration of war—it is the last one—but my learned friend points out that the date (September 29) was perhaps the date at which the document was received in London.

MR. WRIGHT: It is a very difficult document to decipher, but the date at Tsingtau is a date in July. I do not think there can be any question that there has been a mistake in copying. The copyist has taken the date in the margin (September 29) as being the date of the document. When one looks at the document, that is clearly not so; it is the date when it was received in this country.

MR. MAURICE HILL: Yes, it is the very last page—it is a sort of schedule which the Deutsch-Asiatische Bank at Tsingtau sent to the Deutsche Bank in London. As the matter stands the property is in Benck & Kretzschmar, the German shippers in Tsingtau; therefore the goods must be condemned. The right of the Deutsch-Asiatische Bank is only that of pledgees, but it must not be supposed that if the Deutsch-Asiatische Bank were carrying on business in Tsingtau now they would not be enemies.

THE PRESIDENT: I suppose you want to reserve to yourself in the Privy Council a second string to your bow?

MR. MAURICE HILL: Yes, my Lord.

MR. WRIGHT: There is no evidence about this, and if my learned friend wishes to raise a question of that sort, then my clients would require an adjournment, because I understood at the last hearing no question was raised

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as to the head office of the bank being at Shanghai—that was admitted.

The PRESIDENT : But even if that be so, the point Mr. Hill makes now is that if they continued to carry on business at Tsingtau after the declaration of war between Japan and Germany they became alien enemies.

Mr. WRIGHT : On that there is no evidence at all.

The PRESIDENT : If you want to keep that point for the Privy Council I had better not give a decision upon it, and you will not be bound by any other cases.

Mr. MAURICE HILL : I will not ask for an adjournment on that, but I want to give notice that that is a point which will have to be dealt with.

The PRESIDENT : Then it is assumed for the purpose of to-day that this was a neutral bank, and these were neutral traders, but that as they were only pledgees the property had not passed to them, and the 135 bags of ground nuts must be condemned as enemy property.

Mr. MAURICE HILL : If your Lordship pleases.

Mr. WRIGHT : There will be leave to appeal as in the last case ?

The PRESIDENT : Yes.

#### UNDISPUTED CASES.

Mr. MAURICE HILL : My Lord, there are some undisputed cases. The first one, No. 7, is a package of paper fans, and that was shipped from Shanghai to order of Hamburg. There is no claim made to that, but in the next item a claim is made : and those goods the Crown has

released. Therefore, taking the fact that in the case of No. 7 no claim is made, and that the destination is Hamburg, I ask your Lordship to assume that it is enemy property.

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The PRESIDENT : Very well.

Mr. MAURICE HILL : As regards No. 8, the Crown were satisfied, and they have released the goods—soap stones. No. 9 consists of two parcels of three cases of feathers, shipped by Wendt & Co., of Hong Kong, for London or Hamburg. In the margin of No. 9 bill of lading the ship's marks show they are for Hamburg—under each of the marks there is "Hamburg" as part of the mark in the margin. An appearance was entered in that case, but I have not seen any claim, and I do not know that there is anybody here, so that apparently that is not followed up, and I ask your Lordship to condemn those goods.

The PRESIDENT : Yes.

Mr. MAURICE HILL : Then No. 10 stands over ; 11 has been dealt with already ; No. 12 is some casks of moist yolk of egg and white. The ship's bill of lading shows a shipment at Tsingtau to order for Antwerp. There is no claim with regard to those.

The PRESIDENT : Does that mean that the eggs have been broken, and the contents mixed up ?

Mr. MAURICE HILL : Yes, I suppose it is merely the contents. I suppose they are used for some manufacturing purpose.

The PRESIDENT : Not for eating ?

Mr. MAURICE HILL : I do not know what they are used for, but presumably not for eating as eggs. Whether they are used for cake-making or for some manufacturing purpose. I do not know, but I hope now, after this delay,



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they will be used for a manufacturing purpose. I ask your Lordship to condemn this item on the nationality of the shippers.

The PRESIDENT : How do I know the nationality of the shippers ?

Mr. MAURICE HILL : They are a firm of Tsingtau shippers.

The PRESIDENT : Yes, very well.

Mr. MAURICE HILL : Then No. 13 consists of 180 casks of bean oil, which were shipped at Tsingtau to order for Antwerp. There is no claim, and I ask the same order—that they be condemned as enemy property.

The PRESIDENT : Yes.

Mr. MAURICE HILL : Then No. 14 (three cases of pongee silk shipped at Chefoo) is one in which there is no claim, but I cannot prove enemy character, and as the shippers have made no claim I cannot ask your Lordship to release the goods. I do not ask your Lordship to infer enemy character, but I would ask that your Lordship should make an order for the sale of them with payment of the proceeds into Court, and liberty to apply, making a conditional order for condemnation—for instance, if no application is made within six months, that they should be taken as condemned. I do not know whether it would be within your Lordship's power to do that, but it would help to save one from coming along again with these very small items.

The PRESIDENT : I cannot condemn them unless I can draw an inference that they are enemy property.

Mr. MAURICE HILL : No, it is quite true your Lordship

cannot condemn them till the lapse of six months. Order XV., Rule 7, of the Prize Court Rules, 1914, says :

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No ship shall be condemned at the hearing in the absence of an appearance or claim until six months have elapsed from the service of the writ, which shall be verified by an affidavit of service (Appendix A., Form No. 10), unless there be on the ship papers and on the evidence, if any, of the witnesses from the captured ship sufficient proof that such ship belongs to the enemy, or is otherwise liable to condemnation.

The only point is whether under that your Lordship could make a conditional order of condemnation if no appearance was entered—it might save a further appearance. I do not know whether your Lordship can do so.

The PRESIDENT : No.

Mr. MAURICE HILL : Your Lordship will order a sale ?

The PRESIDENT : I will order a sale, and order the proceeds to be paid into Court.

Mr. MAURICE HILL : The next item, No. 15, comprises 61 barrels of bean oil, and No. 16 comprises 184 barrels of bean oil. They were both of them shipped at Tsingtau for Antwerp. The shipment at Tsingtau does not appear upon the bill of lading itself—the place is not filled in—but if your Lordship will look at the ship's papers, the chief officer says that the goods were consigned at Tsingtau to Antwerp, freight being paid at Tsingtau by the consignees. Therefore, I ask your Lordship to find that they are enemy property, as no claim has been put forward.

The PRESIDENT : Yes. Then the result is that I condemn the items 1 to 6 ; and I condemn the paper fans, item 7 ; 3 cases of feathers, item 9 ; 135 bags of ground nuts, item 11 ; the egg yolk and the egg white, item 12 ; 180 casks of bean oil, item 13 ; and items 15, 16 and 17, bean oil. The items 10 and 14 stand over.



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Mr. MAURICE HILL : Yes, with an order for sale in item 14 ?

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The PRESIDENT : An order for sale in item 14.

Mr. MAURICE HILL : If your Lordship pleases.

#### CLAIM OF MESSRS. GEORGES MEYER & CO.

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Mr. MAURICE HILL, K.C. (for the Crown), mentioned a claim which had stood over till this day. He said the claim was in respect of nine bales of strawbraids, the claimants being Swiss merchants, named Georges Meyer & Co. The matter stood over in order that certain papers might be procured from Switzerland.

The Crown could not admit the claim, but were willing that some further time should be allowed to get the papers from Switzerland.

Mr. L. W. J. COSTELLO (for the claimants) said his clients were quite willing to give bail or bring the money into Court.

The PRESIDENT : Very well ; bring the money into Court.

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Mr. MAURICE HILL, K.C. : The present claim is made on behalf of G. Meyer & Co., of Switzerland, who, it is stated, have possession of the papers, and have forwarded to their London Agents the invoices, in proof of the contention that the goods had passed to their ownership on July 20. A remarkable transaction is revealed by the claim to have purchased on this particular date, inasmuch as the same date appears on the bill of lading relating to the shipment of the goods from Tsingtau, in China.

Mr. L. W. J. COSTELLO (for the claimants) called FERDINAND HUBER, the London manager for Mr. Meyer,

who stated that he had been in communication with the Switzerland office regarding this claim during the last few weeks. Mr. Merz, a member of the firm, had recently been in London at witness's office, and he gave witness information as to the transaction. He had had possession of the invoice of the goods, and forwarded this to witness.

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The PRESIDENT : Can you explain how the invoice comes to be dated July 20, the date of the bill of lading in Tsingtau ?

WITNESS said his firm sold goods from China from their stock, and when the order was sent all particulars were given, and Mr. Merz stated that these goods were bought at the same date as the bill of lading.

The PRESIDENT : Was there any stamp on the receipt produced ?

WITNESS said there was not. None was required.

The PRESIDENT : Can the gentleman who has given you the information about the purchase be implicitly believed ?

WITNESS : Yes, your Lordship.

Mr. MAURICE HILL (in cross-examination) : You know nothing about these transactions personally ?

WITNESS : No.

Mr. MAURICE HILL : And Mr. Merz knows nothing personally ?—No, he had to ask somebody in Switzerland.

All you know is that you had to get some evidence in Switzerland to make out a claim to these goods ?—Yes.

And did you ask anyone in Switzerland to make an affidavit ?—Mr. Merz attended to that himself. He telegraphed and wrote about it.

Did he get an affidavit ?—No ; having got the information, he made the affidavit.



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The PRESIDENT : Have you a copy of the telegrams sent ?

WITNESS : No ; they were sent to the solicitors, and were then sent back to our office.

The PRESIDENT : I accept your testimony as to Merz, and as to his veracity.

Mr. L. W. J. COSTELLO : The goods in question have been sold and the proceeds paid into Court.

The PRESIDENT ordered that the amount paid into Court in respect of this parcel of goods, amounting to £65, should be paid to the claimants.

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#### COUNSEL

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For the Crown...     ...     ...     ... *Maurice Hill, K.C.*  
*Stuart Bevan.*

For the Chartered Bank of India ... *Leslie Scott, K.C., M.P.*  
*L. F. C. Darby.*

For Messrs. Mitsui & Co. ...     ... *Adair Roche, K.C.*  
*C. R. Dunlop.*

For the Deutsch-Asiatische Bank... *R. A. Wright.*

For Messrs. Georges Meyer & Co.... *L. W. J. Costello.*

#### SOLICITORS

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For the Crown...     ...     ...     ... *The Treasury Solicitor*  
*for the Procurator-General.*

For the Chartered Bank of India ... *Morgan, Price & Co.*

For Messrs. Mitsui & Co. ...     ... *Waltons & Co.*

For the Deutsch-Asiatische Bank... *Rehder & Higgs.*

For Messrs. Georges Meyer & Co.... *Woodham Smith & Borradaile.*

Austrian Steamship  
**"TERGESTEA."**

4272 Tons.

(A. GIADROSSICH, *Master.*)

*Owners :* Soc. Anon. di Nav. a Vap. G. L. Premuda.

This case is also reported

**50 L. J. Newspaper** 161.      **59 S. J.** 530.

**31 T. L. R.** 180.

*Austrian Ship—Arrest in Civil Proceedings before War—Sixth Hague Convention of 1907, Art. 2—Expiration of Days of Grace—Seizure by Crown—Motion for Judgment in Civil Action—Courts (Emergency Powers) Act, 1914, s. 1 (2)—Priority of Claim of Crown—Order for Detention—Position at End of War.*

An Austrian ship, arrested before the commencement of war in actions for necessities, was seized by the Crown after the days of grace granted under the Sixth Hague Convention of 1907 had expired. The Court held that the rights of the captor took precedence over the claims in the civil proceedings, and made an order for the detention of the ship.

Mr. R. H. BALLOCH applied for an order for the detention of the Austrian steamship *Tergeste*, a vessel of 4,272 tons gross, belonging to the port of Trieste. She arrived at Sunderland in ballast on July 23, 1914, and on July 28 began to load a cargo of gas coal. On August 4 she was arrested in two necessities actions. On August 5 she was seized by the Officer of Customs, who did not know whether she was Austrian or German, but released her the following day. On August 11 she was arrested in two further necessities actions. Following the outbreak of war

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—  
 Before the  
 Right Hon.  
 Sir Samuel  
 Evans,  
 President of  
 the Probate,  
 Divorce, and  
 Admiralty  
 Division.



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between this country and Austria at midnight on August 12, the Officer of Customs again seized the vessel. On August 15 it appeared that a reciprocal arrangement had been made with Austria for days of grace within which vessels in enemy ports might leave, the days of grace extending to August 22. The vessel was released from detention on the 16th, and from that day till the 22nd, so far as the Crown was concerned, she was free to go; but owing to congestion in the port and a consequent lack of facilities for discharging cargoes, the master was unable to get the cargo discharged in the prescribed time. As a result, when the days of grace expired, the vessel was still in port, and on September 1 the writ in the Prize proceedings was issued. With the consent of the Admiralty Marshal the vessel then proceeded to London, where the cargo was discharged.

The PRESIDENT: Do you ask for confiscation or detention?

Mr. BALLOCH: Detention, my Lord. The master claims the benefit of Article 2 of the Sixth Hague Convention, 1907, under which

A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding Article,\* or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation.

There were several claims in respect of necessaries supplied to the ship. Messrs. Pinkney & Co. claimed, as

\* Article 1 provides that "When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it."

agents of the ship, for money advanced to the captain, &c., the Sunderland Towage Company claimed for towage, Messrs. Vivian for bunker coal, Mr. Thomas Maughan for chandlery, and Mr. John Small for butcher's meat.

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The PRESIDENT : What do you say about these claims ?

Mr. BALLOCH said that if his Lordship made an order for the detention of the vessel, that would place her in the hands of the Crown with an obligation on its part to return her at the end of the war, or would give the Crown the right of requisitioning her upon payment of compensation. Therefore, continuance of arrest in the civil proceedings was inconsistent with those rights of the Crown, and the proper course for the claimants was to enter a caveat against the release of the vessel after the war, when they could continue their civil remedy, or, if the ship had been requisitioned, to enter a caveat as regarded the fund in Court. The claimants Maughan and Small had given notice of motion for to-morrow in the Admiralty Division on the civil side, and they apparently were going to ask for judgment, but he submitted that was a remedy which was not available, having regard to the present proceedings.

Mr. JAMES DODD (of Messrs. James & Charles Dodd) said that his firm were acting on behalf of the claimants in the civil proceedings, but they had not instructed Counsel in the present matter, as they understood that the only thing to be asked for was an order for the detention of the vessel.

The PRESIDENT : All the Crown is asking for at present is detention. The civil motion in Admiralty to-morrow had better be adjourned to me, and I will adjourn the present case and deal with both matters together.

Mr. BALLOCH : The Crown has no wish to take claimants by surprise.



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The PRESIDENT : You can formally mention the matter to Mr. Justice Bargrave Deane to-morrow, and tell him that I express the view that the motion should be adjourned to me.

Mr. LEWIS NOAD (for Messrs. Pinkney & Co.) said that he understood that the Royal Commission on the Supply of Sugar were seeking to obtain the use of the vessel as a warehouse for the storage of sugar, and that might involve certain risks to the ship.

The PRESIDENT : Would that be a requisition by the Crown ?

Mr. NOAD : I do not know.

Mr. C. ROBERTSON DUNLOP (for the shipowners) asked that for their protection an order for the detention of the vessel should be made forthwith.

The PRESIDENT : On the application of the Crown I make an order for the detention of this vessel until such further order as this Court may make, and I adjourn the hearing of all these claims till next Monday.

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Mr. BALLOCH, after re-stating the facts, said that he only asked for detention. He would not deal with the two claimants for necessities, who had entered appearances in the Prize proceedings, as he had not yet heard what they were going to say. There were two other claimants for necessities who commenced actions on the civil side of this Division—actions *in rem* against the vessel. Their writs were issued and warrants of arrest served before the outbreak of war between this country and Austria, and they proposed to ask for judgment on the civil side of that Court. He applied, both in the Prize proceedings and in the civil proceedings where the Procurator-General had entered an appearance as intervener, that his Lordship

should stay these proceedings and order the Marshal to withdraw the arrest. He had pointed out on the last occasion that the claimants were amply protected. He submitted that they could not go on with their civil proceedings against the vessel, which was under the hand of the Crown, as his Lordship had held in the *Marie Glaeser*\* that the rights of the Crown were superior to the rights of those who owned maritime liens; and it was of no importance in this case that the arrest in the necessities proceedings took place before the war.

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The PRESIDENT: It might be otherwise, I suppose, if judgment had already been passed?

Mr. BALLOCH: There would have been an order for sale, but the issue of a writ and arrest in the necessities suit only gives a security to the plaintiff.

The PRESIDENT: It is a *lis pendens*, I suppose?

Mr. BALLOCH: Yes, there are no rights determined against the vessel. Arrest makes the vessel a security, but does nothing more.

The PRESIDENT: A security for something which may, or may not, be payable?

Mr. BALLOCH: Which may or may not be payable, and which is always subject to being superseded by superior rights. For instance, your Lordship knows there is no maritime lien for necessities. A mortgagee can always intervene in a necessities suit, and if there is not a sufficient margin to satisfy his mortgage, he gets the money resulting from the sale of the *res* in priority to the necessities man. In the same way, when you have a claim which is supported by a maritime lien, such as a claim on a bottomry bond or for salvage, you can always intervene in a necessities suit and have your claim satisfied first.

\* (1914), ante, Vol. I., page 56.



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The PRESIDENT: That is to say, such rights as the plaintiff has in a necessities action are of a lower kind than those of the mortgagee, or under a bottomry bond.

Mr. BALLOCH: Certainly; he has only got a security which is not a first-class security, and I submit that the rights of the Crown are *a fortiori* and that the proceedings ought not to go on.

Mr. E. W. BRIGHTMAN (for Messrs. Pinkney & Co.) said that his clients had issued their writ before these Prize proceedings were taken, and their whole object was to keep the security good. They had notice that this vessel was to be used for storing sugar by the Sugar Commission, and a vessel used for that purpose was subject to more risk than one that was doing nothing.

The PRESIDENT: Why?

Mr. BRIGHTMAN said that in loading she was moved about, and there was a risk of fire from the stevedores. The insurance of the vessel would suffice, but, as far as he knew, the rule of the Court as to insurance did not apply.

The PRESIDENT: While the vessel is in the custody of the Marshal it is insured, but after it has been requisitioned it is handed over to the possession of the Crown and the Admiralty. I do not understand how the Sugar Commission come into it.

Mr. BRIGHTMAN: I have got a letter dated January 8 from the Sugar Commission saying it is proposed to store sugar in her. If that is the same as her being requisitioned, and the money is paid in under the rule, that satisfies us; but we want to know that our position is sufficiently covered, and that they will give some form of security for using the vessel.

The PRESIDENT : The vessel is only to be detained unless some other order is made by me, and if she is to be used somebody will apply to me to requisition the vessel.

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Mr. BRIGHTMAN : I do not know if that will apply to the Sugar Commission.

The PRESIDENT : I do not know anything about the Sugar Commission. What is the Sugar Commission ; is it an incorporated body ?

Mr. BRIGHTMAN : No, it is a Government Commission, I understand, my Lord. Of course, we issued our writ before, and our security was good and perfected before they came into it.

The PRESIDENT : I should assume that the Commission would insure the vessel too.

Mr. BRIGHTMAN said that he also appeared on behalf of the Sunderland Towage Company, who had an action for towage, but he had nothing to add.

Mr. R. I. SIMEY (for Mr. John Small) : My client has supplied certain of the necessities, such as butcher's meat, to the vessel, and those necessities have been consumed by somebody. Apart from the Prize Court proceedings, I am here to ask for judgment in default of appearance, and I submit that I am entitled at least to judgment here.

The PRESIDENT : You will want me to constitute myself into an Admiralty Court directly.

Mr. SIMEY : Your Lordship is an Admiralty Court.

The PRESIDENT : If I give you judgment immediately after I condemn the vessel or after the vessel is detained, would that suit you ?

Mr. SIMEY : My learned friend Mr. Balloch said something about the vessel being in the hands of the Crown and



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that, therefore, every other right is superseded. The vessel is not in the hands of the Crown : the vessel at present is in the hands of the Admiralty Marshal. It has been correctly seized, and it is a good seizure in law by the Admiralty Marshal even if your Lordship makes a Prize Court order.

The PRESIDENT : The Marshal does not seize it in Prize—the captor seizes it. It is after the seizure or capture that it comes into the custody of the Marshal.

Mr. SIMEY submitted that there was no reason why his client should not in the ordinary course proceed with his action in the Admiralty Court, and get judgment and an order for the sale of the vessel. The Crown could stop it by intervening, but at present the Admiralty Marshal was in possession of the vessel, and his possession could not be interfered with by another Court. He did not think there was any case in which the rights of the Crown in prize had been held to prevail over the rights of the subject where the subject had first issued a writ, and where the vessel was under the writ of the Admiralty Court.

The PRESIDENT : The writ does not give you a charge upon it, necessarily. It has been decided that the right of the captor is stronger than the right of persons who have charges upon the vessel.

Mr. SIMEY : That is not quite the point that I am putting. My position is this : the captor has not got possession of the vessel at present because that is in the Admiralty Court, and he has not got the property in the vessel.

The PRESIDENT : Do you mean that the seizure was unlawful ?

Mr. SIMEY : My Lord, there has been no seizure—two people cannot seize the same vessel.

The PRESIDENT : There has been a seizure.

Mr. SIMEY : By the Admiralty Marshal. If that was so, it was presumably a contempt of Court.

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The PRESIDENT : It may be, and you think I may have to commit my own Marshal !

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Mr. SIMEY : I submit that if the vessel is already in possession of the Court no other person has any right to interfere with the possession of the Admiralty Marshal, and that there is no reason why my action should not be allowed to go on in the ordinary way. I move for judgment in the action as far as that goes, and I move in addition for the sale of the vessel.

Mr. DUNLOP (for the owners of the *Tergeste*) assented to the order for the detention of the vessel in accordance with the terms of Article 2 of The Hague Convention.\* His Lordship need not trouble for the moment with the question of requisitioning, because no application had yet been made for requisitioning. At present the order would impose on the Court the obligation to restore the vessel at the end of the war, which was quite inconsistent with the application which was now made by the necessities man. As far as his Lordship was dealing with this case as a matter of Admiralty, there was a complete answer.

Mr. SIMEY : Is my learned friend entitled to be heard ?

The PRESIDENT : As *amicus curiæ*.

Mr. DUNLOP : I think I am also entitled to appear, because your Lordship will see that in the motion they ask your Lordship to exercise certain powers under the Emergency Powers Act. At p. 35 of the *Manual of Emergency Legislation* your Lordship will find the Statute under which this application is made,† and will see that no appli-

\* Ante, page 150.

† Courts (Emergency Powers) Act, 1914.



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cation can be made under that Act without notice to the debtor. I am the debtor, and therefore no application can be made under this Act unless I am entitled to appear and be heard on behalf of the debtor. It is sub-section 2 of section 1 :

If, on any such application, the Court to which the application is made is of opinion that time should be given to the person liable to make the payment on the ground that he is unable immediately to make the payment by reason of circumstances attributable, directly or indirectly, to the present war, the Court may, in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, by order, stay execution or defer the operation of any such remedies as aforesaid, for such time and subject to such conditions as the Court thinks fit.

So far as the motion for judgment is concerned, I submit that under that sub-section any leave to enforce judgment against the ship should be postponed until after the end of the war, and then they may have liberty to apply. There is an affidavit made by the master in this Prize case, which is before your Lordship. The whole difficulty here has been that he has not any resources in this country owing to the outbreak of war. Communication with Austria has become impossible, and his agents in London who were financing him are one of the three sets of plaintiffs in the action for necessities, so that he is friendless and without resources, and in those circumstances sub-section 2 comes directly into operation and prevents any execution being issued against this ship unless your Lordship thinks fit. There is an answer to the application for judgment. Has your Lordship the notice of motion ?

The PRESIDENT : Yes.

Mr. DUNLOP : The motion, my Lord, is misconceived. In an action *in rem* the practice of this Court is that the

action must be set down for trial; certain notices have to be given; the statement of claim has to be verified by affidavit. The procedure adopted here is the procedure applicable to actions at common law *in personam*, so that the notice of motion is on the face if it defective. There is no affidavit before your Lordship on which you can give any judgment at all. Notice of trial has not been given, and the cause has not been put down for trial as an action. He cited the *Solis* (1885), 10 P.D. 62.

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Mr. SIMEY said that there would be no difficulty in filing the affidavit strictly in accordance with the Rules. On the other point—the point as to the emergency authority—his learned friend was asking his Lordship to exercise his discretion under section 1, sub-section 2, of the Act in favour of an alien enemy.

The PRESIDENT: I do not think much of that point. The Act is only to protect British subjects. It does not restrict you from proceeding against an alien enemy.

Mr. BALLOCH (in reply): With regard to Mr. Brightman's argument, the question of requisition has not yet arisen. With regard to Mr. Simey, he came here asking for judgment; he now asks that this action should pursue its ordinary course down to condemnation and sale of the vessel. The sale of the vessel in order to realize a sum of £300 is not desirable, but in any case the sale is altogether inconsistent with the rights of the Crown.

The PRESIDENT: What do you say as to the point that this vessel could not be hit at all as being in possession of the Court?

Mr. BALLOCH: The Marshal only holds the property and seizes it in order that the debt may be paid by the owners.

The PRESIDENT: He holds it until bail is given; I suppose that is the ordinary course?



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Mr. BALLOCH : That is the ordinary course.

The PRESIDENT : Was bail given in this case ?

Mr. BALLOCH : No bail was given, my Lord.

After some further discussion, Mr. BALLOCH concluded : My submission is that the right of the Crown is above all liens, above all rights of selling the ship. The Marshal can come on behalf of the Crown and take the vessel away, and I submit that the proper order to be made is that the Marshal shall be ordered to withdraw. May I point out that if the vessel is sold in order to pay a debt of some £300—the vessel is 4,272 tons—the Crown will be unable to perform its obligation to Austria under the second Article of the Sixth Hague Convention, which the Crown has adopted by Order in Council ? The Crown is under an obligation to return it at the end of hostilities ; if this vessel is sold it will not be able to perform that obligation. Therefore, I ask your Lordship to make an order for the detention of this vessel, a permanent order as in the *Chile*\* ; an order that the Marshal withdraw in the necessities actions, and, of course, he will withdraw, not on behalf of the Crown. Your Lordship had to consider something like it in the *Terpsichore*. That was a case in the Irish Courts, and your Lordship was asked to say that the Marshal should hold for the necessities man, but your Lordship refused to make your Marshal the servant of the civil claimant.

The PRESIDENT (*to Mr. Simey*) : What is the amount of your claim ?

Mr. SIMEY : £243 16s. 6d.

The PRESIDENT : What is the value of the vessel ?

Mr. BALLOCH : I think she must be worth £30,000 or £40,000.

\* (1914), ante, Vol. I. 8, at page 48.

## JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*) : This vessel, the *Tergeste*, is an Austrian vessel which was in port in this country at the time of the outbreak of war between Austria and this country. By a mutual arrangement with Austria, days of grace were allowed (in accordance with what is said to be desirable in Article 1 of the Sixth Hague Convention), during which the vessel might be allowed to proceed, if she had been furnished with a pass, direct to her port of destination, or any other port indicated in the pass. But by reason of certain matters in the port the vessel could not leave within the days of grace, and did not in fact leave during that time.

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It is admitted, as I understand, on behalf of the Crown, that the vessel was either unable to leave owing to circumstances beyond its control, or was not allowed to leave under Article 2. The days of grace having expired, the vessel was seized on August 23. The result of this arrangement, in accordance with The Hague Convention, is that the vessel in these circumstances is not liable to condemnation, but is only to be detained during the war, on condition of this country restoring it after the war without paying compensation, or this country may, if it think fit, requisition it upon condition of paying compensation for the vessel. I, therefore, in the ordinary course of things, would have to order this vessel to be detained.

Now there are certain claims for necessities put forward here; some claimants, apparently, have not brought any proceedings, but there are two sets of claimants who have issued their writs, and had warrants of arrest on the vessel before the seizure, and Mr. Simey—who was the bolder of the two advocates—put forward a claim to the



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fruits of a judgment which he wanted to have signed to-day, in preference to the claims of the seizors.

I have dealt with the general principles upon which such claims have to be decided. The captor takes precedence of any claim of those who are mortgagees, or have bottomry bonds, or who have maritime liens, and, *a fortiori*, of those who have merely claims for necessities. It is quite true that in two of these cases the actions were set on foot, and the Marshal arrested the vessel in these necessities actions before her seizure in Prize; but that was only done in order to give the plaintiffs security for such sum as they would have been able to establish in the actions as the sum to which they were entitled. In my view that does not prevent the Crown from seizing the vessel in port; and, therefore, I cannot give effect to the notice of motion which has been filed here on behalf of the claimants.

The order will be that the vessel will be detained as in the *Chile*.\* With reference to the actions of the claimants, I think the better course will be to stay all proceedings in those actions until further order, and to give the plaintiffs in those actions liberty to apply. The vessel may be requisitioned by the Admiralty, and some of the proceeds of the vessel may be brought into Court—I do not know. That may be so; but a caveat can be entered by the claimants in the necessities suits and in these proceedings, so as to prevent any dealing with this vessel or with its proceeds without notice to them. At the end of the war, if this vessel is still in existence, or the sum which represents it, they will be in a position to make any application to enforce their rights (if any) against the vessel, as they would have been but for the interposition of these proceedings.

\* (1914). ante. Vol. I.. at page 48.

Mr. DUNLOP : In order to have only one set of detention expenses, I ask that the order of arrest of the Marshal in the necessities action be withdrawn; he is in possession of the ship in the necessities action. Then under your Lordship's order the vessel will be detained by the Crown.

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The PRESIDENT : Does that necessitate two sets of proceedings ?

Mr. DUNLOP : Unless one is withdrawn they will be absolutely clashing.

The PRESIDENT : There is nothing in the other action—the necessities action. If they are stayed, he does nothing.

Mr. DUNLOP : His arrest is withdrawn.

The PRESIDENT : Is that the proper form ?

Mr. DUNLOP : Yes, my Lord; otherwise the ship will remain under arrest in the necessities actions, and the Marshal will have to keep the vessel under arrest in these actions unless the writ is removed. Your Lordship's order with regard to the caveat is really providing for his going out of possession, and the necessities claimants can then protect their rights by entering a caveat in the Caveat Book at the Registry. That means that the ship will not be under the arrest of the Marshal in the necessities actions.

The PRESIDENT : I will tell you what I had better do. I will suspend his possession in the necessities action for the time being.

Mr. DUNLOP : Yes, my Lord.

Mr. BALLOCH : As long as he does not have two sets of expenses.

The PRESIDENT : No, technically he will remain in possession for all purposes necessary to protect the plaintiffs, and that is all.



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Mr. BALLOCH : If your Lordship pleases.

The PRESIDENT : Perhaps I ought to say this in addition. It is unnecessary for me now to deal with the other point, as to whether the notice of motion is in proper form. But in order to have judgment in the Admiralty actions, the plaintiffs must take care to put those proceedings in the right form if they wish to make any further application at some future time.

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#### COUNSEL

For the Crown...	...	...	<i>R. H. Balloch.</i>
For the Shipowners	...	...	<i>C. Robertson Dunlop.</i>
For Messrs. Pinkney & Co.	...	...	<i>Lewis Noad.</i> <i>E. W. Brightman.</i>
For Mr. John Small	...	...	<i>R. I. Simey.</i>

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#### SOLICITORS

For the Crown...	...	...	<i>The Treasury Solicitor</i> <i>for the Procurator-General.</i>
For the Shipowners	...	...	<i>Holman, Birdwood &amp; Co.</i>
For Messrs. Pinkney & Co.			
and			
Mr. John Small	...	...	<i>Downing, Handcock, Middleton &amp; Lewis.</i>
For other Claimants	...	...	<i>James &amp; Charles Dodd.</i>

British Sailing Ship  
**“CUMBERLAND.”** 1849 Tons.  
 (Cargo *Ex.*)

(W. BARFIELD, *Master.*)

*Owners* : Messrs. John Stewart & Co., London.

This case is also reported

**31 T. L. R.** 198.

*British Ship—Enemy Cargo—Seizure of Cargo at Falmouth—Ship sent to Liverpool for Discharge—Delay at Liverpool pending Sale and Discharge of Cargo—Condemnation of Cargo—Claim by Shipowners for Compensation—Legal Position of Marshal—Prize Court Rules, Order XI., Rule 1—Naval Prize Act, 1864, ss. 16, 19.*

A British vessel bound for Hamburg with an enemy cargo of nitrate of soda put into Falmouth, where the cargo was seized; and by arrangement with the Admiralty Marshal she went to Liverpool, where the cargo was kept on board for several weeks before it was sold, owing to the difficulty of finding a berth and warehouse room. The Court refused to make an order against the Marshal to pay compensation for the use of the ship as a warehouse, but gave the Marshal leave to pay the shipowners a reasonable sum out of the proceeds of the cargo.

Mr. T. H. T. CASE (for the Crown) applied for the condemnation of a cargo of about 30,000 bags of nitrate of soda, shipped at Taltal, in Chile, on the British sailing ship *Cumberland* direct for Hamburg. He said that the cargo was shipped under a bill of lading by Messrs. H. Folsch & Co., of Hamburg and Taltal, to the order of Messrs. Brandt, of Hamburg. The ship was under

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 Before the  
 Right. Hon.  
 Sir Samuel  
 Evans,  
 President of  
 the Probate,  
 Divorce, and  
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charter-party to Messrs. Folsch, the shippers, and the shippers received letters from Messrs. Seimers & Co., of Hamburg, who said that they held the cargo. Messrs. Folsch, Messrs. Brandt, and Messrs. Seimers being all German firms, there was no question as to the enemy ownership of the cargo.

In consequence of the war the ship put into Falmouth on November 27, and it was found impossible to discharge the cargo there because there was no market for nitrate at that port, and she was accordingly ordered by the Marshal to Liverpool. She arrived in Liverpool on December 13, and there was a claim by the owners in respect of the use of the ship as a store. He submitted that this claim could not be entertained, the loss to the owners incidental to the seizing of the cargo on the ship being an accident of war for which the seizing parties could not be responsible. He cited the *Roumanian*,\* which was a case of demurrage.

The PRESIDENT : That was a different thing.

Mr. CASE : I submit, my Lord, that the same principle would apply here. The difference in principle between warehousing and demurrage could only be small, because at any time the ship is, in fact, a warehouse for the goods on board of her, and she only ceases to hold the goods as a ship when the delay has been so great that you could no longer regard her as a carrying ship, but have to regard the vessel as in the nature of a warehouse. I submit that such a point has not been reached in this case.

The PRESIDENT : Are the goods on board the ship now ?

Mr. CASE : Still on board the ship.

The PRESIDENT : Why have they not been discharged ?

Mr. CASE : Because it is impossible to find any warehouse in Liverpool to take them. If your Lordship

\* (1914), ante, Vol. I., page 191.

condemns the goods they will be sold, and that will get over the difficulty.

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Mr. C. ROBERTSON DUNLOP (for Messrs. John Stewart & Co., the owners of the ship) said that on the day when the vessel arrived at Falmouth, on November 27, the cargo was seized as prize. On November 28 an application was made to the Crown to allow the cargo to be discharged either at Falmouth or at Plymouth. The result of that application was that the Procurator-General communicated with the Admiralty Marshal, who came to the conclusion that it was not a profitable thing to try to sell a cargo of nitrate at either Plymouth or Falmouth—not because there were no facilities for discharging, but because there were difficulties in selling.

By order of the Marshal she left Falmouth for Liverpool about December 12; at any rate, she arrived in Liverpool on December 13. She was still there, with the cargo on board, because, apparently, the market was not suitable for selling nitrate of soda. The price had gone down, and it was thought that by delaying the sale a better price would be realized for the benefit of the Crown. The cost of warehousing this cargo would be about £4 a day, and the cost to the owners of keeping the ship as a warehouse was about £7 a day, not including loss of profit. In those circumstances, allowing a week for the discharge of the cargo at Falmouth, the shipowners maintained that this ship had been used from December 13 till now as a warehouse. They not only claimed freight for the carriage of the cargo from Chile to Falmouth, which would, no doubt, be referred to the Registrar on the principles of the *Juno*,\* but they also asked for directions, or an order that they should get compensation for the ship being used as a warehouse from December 13 until such time as the cargo

\* (1914), ante, Vol. I., page 177.



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was discharged. It had been used as a warehouse only for the benefit of the Crown, and after the offer made by the shipowner to discharge at Falmouth it was most unbusinesslike and unreasonable to order her to Liverpool before making inquiries whether the cargo could be discharged and sold there.

The PRESIDENT : Is there a Rule under which she was authorized to be sent to Liverpool ?

Mr. DUNLOP : No, my Lord, there is no Rule, but the ship was bound to go there. The Marshal of the Court, acting as the mouthpiece of the Procurator-General, ordered the ship to go.

The PRESIDENT : Under what provision does he do so ? Is there no Rule about it ?

Mr. DUNLOP : There is no Rule by which the ship can be removed.

The PRESIDENT : Yes, there is—Order XI., Rule 1 :

The Judge may, at any time on the application of the Marshal or any party, make such order as to the removal, safe custody or preservation of a ship as he may think fit.

Mr. DUNLOP : Order XI. seems to contemplate a ship against which proceedings were being taken, because it goes on to say that the Judge may, on or after condemnation, order the ship to be appraised.

The PRESIDENT : In looking at Order I., Rule 2, you will find this :

Unless the contrary intention appears, the provisions of these Rules relative to ships shall extend and apply, *mutatis mutandis*, to goods and to freight (if any) due or to grow due; and for such purpose the term "ship" when used in these Rules shall also mean "goods" and "freight."

In this Order you can read the word "goods" instead of "ship."

Mr. DUNLOP said that the vessel might have been discharged at Falmouth and allowed to go free, and then an order could have been made for the removal of the cargo to Liverpool or some other place where it would command a better price, and in these circumstances it would be a scandal if a shipowner were merely to get his freight after being detained.

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The PRESIDENT: Your opponent says that I have already determined this against you.

Mr. DUNLOP said that in the *Roumanian*\* this question did not arise.

The PRESIDENT: I do not think it was the *Roumanian*; there was a reference to some other case.

Mr. DUNLOP: There was a claim for demurrage.

The PRESIDENT: I disallowed that claim.

Mr. DUNLOP said that in the case of the *Roumanian* the ship, after receiving notice that the war had broken out, went to Dartmouth, and she was delayed at Dartmouth while communications went on as to where it would be most convenient for the cargo to be discharged. She could not have discharged her cargo at Dartmouth, because there were no tanks at Dartmouth, and, therefore, it was desirable that she should go to a place where she could discharge her cargo into tanks. That was very different from this case.

The PRESIDENT: How came this vessel, the *Cumberland*, to go to Falmouth?

Mr. DUNLOP said that under the charter-party Falmouth, Queenstown, and Plymouth were ports of call. She went into Falmouth to ascertain whether she could go on to Hamburg or not. That was not the end of the voyage,

\* (1914), ante, Vol. I., page 191.



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but the voyage was terminated by the cargo being seized at Falmouth. Thereupon the shipowners were prepared to deliver the cargo at Falmouth, subject to such freight as they would be entitled to on delivery at Falmouth, on the principle of the judgment in the *Juno*.\* If they only got the order for freight they would only be put in the same position as if the cargo had been discharged at Falmouth. They also wanted compensation for time lost between December 13 and the date when the cargo was discharged.

The PRESIDENT : According to international law, on capture of a ship she must be taken to the nearest available port.

Mr. DUNLOP cited the *Wilhelmsberg*,† reported in 1 E.P.C., p. 437. The head note was :

When a vessel is not taken to a convenient port for adjudication, the captor is liable to be condemned in damages and costs.

Under 43 Geo. III., cap. 161, the captor was bound to bring the ship to a convenient port, but there was an editorial note :

Notice this point is no longer regulated by statute.

The PRESIDENT : I see in Mr. Holland's *Manual of Naval Prize Law*, p. 80, which is dated 1888, that he says that from the many ports which could be selected, that one should be selected which under all the circumstances would seem the most convenient. Regard should be had, first of all, to the exigencies of the public service, the safe harbourage of the vessel, and to its being in easy communication with the Prize Court before which it had to be brought, and he gives a reference to the cases of the *Washington*‡ and the *Principe*.§ Further, it should be

\* (1914), ante, Vol. I., page 177.

† (1804), 5 Ch. Rob. 143.

‡ (1806), 6 Ch. Rob. 275; 1 E. P. C. 555.

§ (1809), Edw. 70; 2 E. P. C. 23.

as near as possible to the place of capture. Various authorities are given for that.

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Mr. DUNLOP said that in the *Wilhelmsberg*\* Sir William Scott allowed one month's demurrage expenses because the ship had not been taken to a convenient court for adjudication, and continued:—I submit that the same principles on which your Lordship in the *Juno*† allowed freight—although the cargo had not been carried to its contract destination—apply to a claim for compensation for detention or the use of the ship as a warehouse, because I apprehend that the ground on which your Lordship allows freight and expenses to the shipowner on an enemy cargo is that the Crown, by seizing the cargo in an English port, has had the benefit of the shipowner's work and labour in bringing it in from a foreign port. Here the Crown has had the benefit of the cargo being taken from Falmouth to Liverpool, and has been saved warehousing charges at Liverpool so long as the cargo remains on board this ship waiting until the market improves.

The PRESIDENT: Who ordered the ship from Falmouth to Liverpool?

Mr. DUNLOP: The Marshal.

The PRESIDENT: Not the captor? I think you are confusing the two.

Mr. DUNLOP: No, my Lord, I think not. On November 29 the Treasury Solicitor wrote this letter in reply to ours asking to discharge at Falmouth:

I am directed by His Majesty's Procurator-General to acknowledge receipt of your letter of yesterday, and to say that no report has yet been received in this Department of the detention of the cargo on board this vessel, but enquiry

\* (1804), 5 Ch. Rob. 143; 1 E. P. C. 437.

† (1914), ante, Vol. I., page 177.



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has been made at Falmouth in order that early action may be taken. In the meantime, I would suggest that you should communicate direct with the Admiralty Marshal with a view to his arranging for the early discharge of the cargo, as this is a matter in which he, and not the Procurator-General, will give the effective instructions—

in other words, instructions from the Procurator-General, who consulted the Admiralty Marshal.

The PRESIDENT : That is why I deferentially suggested that you are confusing the two people—the Marshal with the captor.

Mr. DUNLOP : The captor is the Procurator-General.

The PRESIDENT : Against whom are you launching your claim ?

Mr. DUNLOP : Against the Procurator-General.

The PRESIDENT : Then if so he, *prima facie*, is not liable for anything the Marshal does. Of course, it is possible that the circumstances were such that the acts of the Marshal were acts done by the request of the captors. The Marshal is the officer of the Court. *Prima facie* the captors are not responsible for anything the Marshal does.

Mr. DUNLOP : I submit that the Crown must be liable for what the Marshal has done, if the Crown instructs the shipowner to communicate with the Marshal, and act on his orders.

The PRESIDENT : That may be.

Mr. DUNLOP : It is substituting the Admiralty Marshal for the Procurator-General.

The PRESIDENT : I want to know the circumstances under which the ship was sent from Falmouth to Liverpool, and the circumstances under which she was detained at Liverpool, and the cargo kept on board.

Mr. DUNLOP : That is information the Crown can give you. All I know is that the ship is there, occupied by the cargo. There is only one other point I want to mention, viz., that the captor, when he seizes the cargo, has a duty to the cargo and a duty to the ship, and he cannot get rid of either duty by deputing his functions to an officer of the Court.

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Mr. CASE (in reply) pointed out that, although the charter-party made Falmouth a port of call for orders, in fact the agents of the shippers sent a letter to the master at the South American port directing him to proceed to Hamburg direct, so that the vessel probably put into Falmouth for special reasons. He submitted that this cargo had not been diverted to Liverpool to wait for a rising market. The ship had been ordered to Liverpool because that appeared, on a survey of the facts, to be a most reasonable and convenient course. If there was no market at Falmouth, the captor was justified in taking the ship somewhere where there was a market.

The PRESIDENT : I daresay you were, but were you justified in taking the ship there at the expense of the ship-owners ?

Mr. CASE : I should say "yes" for this reason : You have the ship taken into a port which is convenient in every way except that there is no market at all there for the cargo——

The PRESIDENT : That may be the misfortune of the captor.

Mr. CASE : Yes, but it is also the misfortune of the shipowners in one case, because if there is no market, and the goods are simply carted ashore, where does anyone profit at all ? In such a case your Lordship would surely let us take the cargo to some further port ?



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The PRESIDENT : They might lose their freight.

Mr. CASE : I am only relying on this to say that the first port at which the vessel gets after capture is not necessarily a port at which it is convenient for her to stay.

The PRESIDENT : Where do you find any authority for the proposition that the owners of an innocent ship must suffer the loss and expense of taking the cargo to a place where the captor could turn it to the best advantage by way of profit and sale ?

Mr. CASE : My authority, I think, with all respect, follows the decisions in the cases on demurrage, because the principle is the same.

The PRESIDENT : Oh, no, this matter has never been decided.

Mr. CASE : No, but I am suggesting that the principle is much the same, and that really you cannot get in a claim for delay to the ship by calling it a claim for warehousing.

The PRESIDENT : Falmouth is not far from Plymouth. What is the state of things at Plymouth ?

Mr. CASE : I am instructed, my Lord, that there was no market at Plymouth, but I am also instructed that the owners were offered their choice of Glasgow or Liverpool, and that they chose Liverpool.

The PRESIDENT : That sort of possibility suggested itself to my mind, and that is why I said I ought to be made aware of the facts.

Mr. CASE : May I draw your Lordship's attention again to the letter of November 29 ?

The PRESIDENT : Yes.

Mr. CASE : I suggest that there is nothing in that letter to make the captors, as such, responsible for the acts of the

Marshal. If they are not responsible—apart from that letter—then I submit that there is nothing in that letter whatever to make them responsible. It is simply advice given for the benefit of the owners.

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The PRESIDENT: I see amongst the papers before me a telegram of November 30 from the Admiralty Marshal to the Customs Authorities at Falmouth:

*Cumberland*: You may allow this vessel to proceed to Liverpool to discharge her cargo. Please inform your master.

That looks as if it were by the request of the shipowner that she went to Liverpool. You do not know the facts?

Mr. CASE: I cannot tell your Lordship that I do.

The PRESIDENT: Then you ought to have an opportunity of getting at the facts and putting them in order, so that I may know what they are.

Mr. CASE: Will your Lordship let the matter be adjourned?

The PRESIDENT: What do you say, Mr. Dunlop?

Mr. DUNLOP: They asked for an affidavit from us; we gave them an affidavit of Mr. George Young. Mr. Young is a member of the firm of John Stewart & Co., the owners of the *Cumberland*, and it sets out the facts as we know them, and then it says that on November 28 the cargo was seized as prize, and that on the same day a letter was written to the Procurator-General which I have read to your Lordship, and the Procurator-General's reply.

The PRESIDENT: This affidavit requires to be dealt with; in other words, it requires to be answered.

Mr. CASE: Yes, my Lord. Will your Lordship give me an adjournment for the facts to be ascertained?



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The PRESIDENT : Yes, I think so. This is an important matter which may arise in various other cases ; I must know the facts.

Mr. CASE asked for the condemnation of the cargo now, reserving this question.

The PRESIDENT : Yes, this cargo is enemy property, and I condemn the cargo and order it to be sold, the proceeds to be paid into Court.

Mr. DUNLOP : Will your Lordship give us a like opportunity to file a further affidavit dealing with this question—how it came that we were ordered to Liverpool ?

The PRESIDENT : I will adjourn the case generally so that the Crown may put the matter fully before me in a careful statement. The first question of principle which arises is this : at what place ought the cargo to be discharged when it is seized in a port, the cargo being a cargo of nitrate ? If the shipowners have a right to say, " You have seized the cargo, and we are going to discharge here and now," it would look as if they were entitled—if there were no other facts in the case—to some compensation for the loss of the ship while the cargo still remained in her. But it may be, of course, that in this case there was a request by the master of the ship that the cargo should be taken to some more convenient port—I do not know. I adjourn the consideration of the claim for a fortnight.

Mr. DUNLOP : When the discharge of the cargo is finished the freight can be ascertained in accordance with your Lordship's decision in the *Juno*,\* independently of this.

The PRESIDENT : No, there is no hurry for that ; all the claims must be dealt with together.

\* (1914), ante, Vol. I., page 177.

Mr. F. D. MACKINNON, K.C. (for the Crown), said that the owners of the ship raised a claim which was strictly one for damages by way of compensation, as against those whom, with a judicious vagueness, Mr. Dunlop called the parties concerned, on the ground that the ship had been used as a warehouse for the cargo for a considerable period. The Procurator-General's view was that this was very likely the sort of case in which quite properly some allowance ought to be made, but he submitted that it was not a case in which anything in the shape of a decree for damages or an admission of liability ought to be made; it was not desirable in the circumstances that the Crown should be involved in many such claims, although there were individual cases in which it might be proper to make an allowance to the ship.

The chief thing to bear in mind in this case was the difference between a claim against captors and a claim against the Admiralty Marshal.

The only authority which Mr. Dunlop referred to was in a line of cases where damages were awarded against *captors* on two grounds—first, for being dilatory in initiating and carrying on proceedings and bringing the matter before the Court; and, secondly, for delay involved in taking the ship into an improper or inconvenient port. There were several in 4 Christopher Robinson—for instance, there was the case of the *Madonna del Burso*, on page 169.\* There, the ship being released, a claim was made against the captors for damages. On page 171 Sir William Scott said :

It does not appear that any proceedings were commenced against this ship, or the valuable cargo which she contained, until the latter end of February, 1798—that is, for the space of about three months.

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Then (page 175) he allowed three weeks as being a sufficient time for the captor to have made up his mind and taken proceedings, and for any delay beyond that time in the initiation of the proceedings he was to pay demurrage. On page 184 he said :

Upon these considerations, I think there is much of what I shall not call damage, but a loss which calls for compensation.

There were several cases at that time, and there was one case, in the Crimean War, the *Gerasimo*,\* and the head-note was this :

It is the duty of the Captor, as soon as possible, to send a prize to some convenient port in Her Majesty's dominions for adjudication, and to procure the examination in preparatory of the principal officers of the captured vessel, and to deposit in the Admiralty Court all papers found on board the prize. Penalty for neglect of these rules.

The PRESIDENT : The ship and cargo were restored there ?

Mr. MACKINNON : Yes, my Lord. On page 117, at the bottom, this passage occurs :

But as regards the Claimants, his conduct appears to be without any excuse, and their Lordships have no hesitation in advising restitution of the cargo, with costs and damages against the Captors,

the main part of which, I think, was for the delay in sending the ship home and getting her before the Prize Court. Now, the position in this case, I think your Lordship will find, is quite different. The dates are as follow : The ship was seized on November 28 at Falmouth by the officers of Customs. She left Falmouth on December 9 and arrived in Liverpool on December 13, and the cargo remained on board of her until, I think,

\* (1857), 11 Moore P.C. 88; 2 E.P.C. 577.

January 20, at any rate until a day or two after the last hearing before your Lordship, on January 18, when she was removed to Garston, where she was discharged.

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Mr. DUNLOP : No, my learned friend is in error—the discharge is not begun yet. The cargo is still on board ; it was sold on January 20.

Mr. MACKINNON : I understand that in the terms of the sale to the buyers there is some provision which will give the ship an amount for demurrage from the buyers since the 20th.

Mr. DUNLOP : I understand that one of the terms of the contract of sale between the Marshal and the purchasers was that the buyers were to give the ship a ready and immediate berth at Garston. Upon those terms the ship went to Garston, but so far from the buyers being able to give the ship a ready and immediate berth, they are not able to give her a berth to-day. But if the Marshal, under the contract of sale, is able to get compensation from the buyers for detention, and will hand it over to the ship-owners, they will be quite content.

The PRESIDENT : Then you do not make any claim for compensation for damages or demurrage after the 20th?

Mr. DUNLOP : No, my Lord, except in so far as the Marshal ought, by the contract of sale, to have protected the shipowners from the consequences of delay by making the buyer pay. The Marshal is the only one who can enforce the contract on the buyer. The shipper is not a party to the contract of sale, and the purchasers are not the consignees of the cargo under any contract of carriage, so that the shipowner can only look to the Marshal, and the Marshal can look to the buyers.



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Mr. MACKINNON : As regards the delay up to the 20th, I call your Lordship's attention to the statement I have from the Marshal, and I think your Lordship will see how it deals with that. The point that I want to bring to your Lordship's attention is the great distinction between the case which I have referred to—which was really a case of the misconduct of the captor—and the present case, namely, that this is a claim which is really being made against the Admiralty Marshal as an officer of this Court. I think it depends on the Naval Prize Act, 1864, section 16. The Act deals first with the duty of the captors :

Every ship taken as prize, and brought into port within the jurisdiction of a prize court, shall forthwith, and without bulk broken, be delivered up to the marshal of the court.

Then the material sub-section is :

The ship shall remain in the custody of the marshal, or of such officer, subject to the orders of the court.

The duty of the captors not to be dilatory and not to take the ship to an improper port is recognized by section 19. The captors here were the officers of Customs at Falmouth. They seized the ship on November 28. The affidavit by the officer of Customs there, setting out the ship's papers, and affording all the evidence on which your Lordship condemned the cargo, was sworn that very day, November 28; so that there was no delay by the captors. On the same day, in accordance with the Rule, communication was made to the Marshal that they had seized this ship under the Act, and thereupon the custody becomes that of the Marshal, strictly speaking. I think he employs the Customs officers as his deputies to maintain the custody, but thereafter the Customs people hold it as the officers of the Admiralty Marshal and not as captors. There is no question that proceedings were duly instituted and carried

on with despatch. The writ was issued on December 5, and the case came in due course before your Lordship. After November 28, when they had sworn their affidavit and handed over the goods to the Marshal, the captors dropped out, and I am not troubled with the line of cases concerned with the damages against captors for improper conduct or delay.

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Mr. MACKINNON then referred to an affidavit made by the Marshal in answer to the affidavit of Mr. Young, which was before the Court last time, and read paragraph 2, which stated :

At no time prior to the *Cumberland's* sailing from Falmouth on December 9th, 1914, did I receive any directions or instructions from anyone acting for the Procurator-General as to the place at which the *Cumberland's* cargo was to be discharged.

On November 28th, 1914, I was informed that the cargo in question had been seized at Falmouth, and I at once made enquiries as to the port at which discharge could properly be made.

There was no market at Falmouth for nitrate of soda, of which the cargo was composed, and there appeared to be difficulty in finding there any storage accommodation for the cargo, as Falmouth, being only a port of call, has no storage facilities.

I was interviewed by Messrs. W. A. Crump & Son, solicitors for the shipowners, upon the matter. I placed before them my view of the facts as to market and accommodation, and also pointed out that to discharge at Falmouth might prove to be of so little benefit to any person to whom the cargo should ultimately be released, as to cause such person to repudiate any claim by the shipowners for freight for carriage to so unsuitable a port. The solicitors arranged to consult their clients on the matter and see me again.

They saw me again shortly afterwards and we discussed the question of a suitable port to which the vessel should be taken for discharge, and I mentioned Liverpool, and Glasgow. To the best of my recollection I think Leith was also mentioned, but the solicitors eventually said that their



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clients would prefer that the ship should go to Liverpool. I accordingly telegraphed on November 30th to the Customs authorities at Falmouth in the following terms:

Customs, Falmouth.

*Cumberland.* You may allow this vessel to proceed to Liverpool to discharge her cargo. Please inform your master.—Admarsh, London.

The shipowners claimed demurrage then or subsequently, and pressed their claim on various occasions.

From and after November 30th the ship was free, so far as I, or any person by me authorised, was concerned, to proceed to Liverpool forthwith.

The ship, in fact, left Falmouth on December 9th and arrived at Liverpool on December 13th. The delay in leaving Falmouth was entirely due to the shipowner, and I believe the cause was the inability to procure tugs.

There is a subsequent affidavit by the shipowner which says that the bad weather, as well as the inability to procure tugs, caused the delay.

The delay which followed the arrival of the vessel at Liverpool was solely due to the difficulty of finding a discharging berth and warehouse accommodation owing to the congested state of the port.

I made arrangements on January 16th, 1915, for discharging the cargo at Liverpool, but condemnation of the cargo being decreed on January 18th the cargo has been sold as at Garston, whither by arrangement with the owners the ship has now proceeded. I have agreed to pay all reasonable expenses which the owners may incur by reason of her going from Liverpool to Garston.

Mr. MACKINNON submitted that it was untrue that, as stated by Mr. Young in his affidavit, the Admiralty Marshal directed the vessel to be taken on to Liverpool on the ground that Liverpool was a good market for the disposal of the cargo. What appeared to have happened was that there was a discussion with the solicitors, and the Admiralty Marshal pointed out that at that time it was not clear who would get this cargo—whether it was to be condemned to the Crown, or released to some claimant.

There was no compulsion, and the shipowners chose Liverpool as the port to go to, and in point of fact it was not a very good selection, because at Liverpool it was impossible to find any place in which to store the cargo. That was shown by a letter quoted by Mr. Young at the end of his affidavit, in which his own agents, Messrs. Gracie, Beazley & Co., wrote to him from Liverpool, on January 12 :

We regret the delay this ship is experiencing, but we have done all in our power to facilitate matters. The Dock Board not having any space to offer in their warehouse for the storage of this cargo of nitrate, at the request of the Collector of Customs we tried to secure space in Liverpool. We wrote to every warehouse owner in the city, but were unable to get the offer of storage space of any description.

If the shipowners had any ground for saying that there was any neglect of proper precautions to discharge this cargo into an available warehouse, they could have taken steps themselves in the matter. They might have applied to the Court under Order XI., Rule 1, of the Prize Court Rules, 1914, as extended to goods by Order I., Rule 2.\* That Rule would have given the Court full power to make an order if the shipowners had come and said, "Here is your cargo being improperly kept on our ship," and they had made out a reasonable scheme by which it could be removed. But they did not do that, probably for the very good reason that it would have been idle to go to the Court and ask for an order to discharge into a warehouse when the Marshal would say, "I am anxious to discharge into a warehouse if you can tell me of one which I can use." There might, as the Procurator-General realized, be good grounds for saying that as the cargo had in fact benefited to some extent by being kept on the ship instead of in a warehouse, some proper allowance ought to be made, but

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there was no ground for any order giving damages against the Marshal for anything that he had done or omitted to do.

There was only one case where that had been done, the *Hoop*; not the great *Hoop* case, but another *Hoop*.\* That was a claim made against the Marshal to recover the value of a long-boat and best bower cable, lost whilst the ship was under his custody. The Marshal did not condescend to make an appearance, or make any answer, and the Court said :

It is not proper, that such a complaint should be left, without an answer being returned to it on the part of the Marshal. The credit of the Court is concerned in the safe keeping of the property under its protection. If any such property is lost, it is at least the duty of the Marshal to be prepared to show that it was not lost by any default of his. If the fees of the Marshal's office are not sufficient to enable him to provide means of security, it should be represented to those who have authority to increase them; but it is not a time to rely upon such a plea, when the property under his keeping is alleged to have been already lost. As the statements of these affidavits are not contradicted, I shall decree as prayed—

which was for damages for the value of the boat which had been lost. That case was *toto cælo* removed from this case, where, in the discharge of his very difficult duties in connection with these cargoes, the Marshal advised the owners that they had better take their ship somewhere else, and they selected Liverpool, and when they got there, their agents were asked by the Marshal to assist him, and they could not find any possible place in which to discharge the cargo. This was not a case in which anything in the nature of compensation by way of damages should be decreed against the Procurator-General, or, as it would have been in the old cases, against the captors. Still less

\* (1801), 4 Ch. Rob. 145.

was it a case in which, on the authority of the *Hoop* case, any sort of order could be made against the Marshal personally to pay damages. But a claim for some allowance, not as of right, and outside of the Court, would be received with every consideration.

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The PRESIDENT: In most of these cases masters and owners of the vessels act in a friendly way, and try to do the best for all concerned. It may be very much in the interest of the master of the vessel to have the cargo sold to advantage, otherwise it might be sold almost at a loss, and he might lose his freight; but if the merchant sells it at a good price he gets his freight, and so on. Supposing they were not meeting in this friendly spirit, and the master said, "Very well, you have seized the cargo, I will put it on the quay for you," would he have a right to do it? Is there any right in the captor to use the vessel at all—I will come to the Marshal afterwards?

Mr. MACKINNON: Supposing this point had arisen in Falmouth, and the shipowner had said, "No, I am not going to Liverpool, I am going to turn this cargo out here, you must take discharge of it." If the shipowner adopted that attitude, strictly speaking I think he would be entitled to do so—but then no doubt the Marshal would serve a summons on him to come before your Lordship under Order XI., Rule 1, and some directions would be given to him.

The PRESIDENT: Could I give him some directions for the removal of the goods in the vessel? The vessel is not doing any wrong in carrying these goods. Could I, when the vessel is not subject to seizure, and the cargo alone is seized, order the vessel to be used at all for the purposes of those who are interested in the proceeds of the cargo? I am not suggesting that this is such a case.



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Mr. MACKINNON referred to the *Washington*.\* There the vessel had been taken into Jersey, which was an improper port, and Sir William Scott, on page 281, said :

I wish to repeat, that it must not be considered as an improper act of discretion to carry prize vessels to the ports of Guernsey and Jersey; but they must be such vessels, as are not unfit to be received there with suitable accommodations. It turns out, in this case, that it would have been infinitely more beneficial to all parties, captors as well as claimants, that the vessel should have been brought to some port of this kingdom, or, under the circumstances, to London.

The PRESIDENT : That is the removal of the vessel—of the thing seized. The thing seized here is the cargo. Have I any right at all to order the removal of the vessel, or to make any order in respect of the cargo which necessitates the vessel being used ?

Mr. MACKINNON submitted that it was not necessary in this case to determine the point, although it was one on which as a question of law he felt great difficulty.

The PRESIDENT : No, it is not necessary to decide it in this case. Here what was done—apart from the length of time taken to do it—was done with the full assent of the owners of the ship.

Mr. MACKINNON : Yes, but I should admit, as the Marshal said, that they grumbled. They said they wanted demurrage, but still there was no compulsion.

The PRESIDENT : The other point to bear in mind is to ascertain exactly when the captor finishes with his part of the transaction, and when the Marshal begins with his.

Mr. MACKINNON : That becomes in this case a matter of almost metaphysical inquiry, where the captors are the Customs officers.

\* (1806), 6 Ch. Rob. 275, at page 281; 1 E.P.C. 555.

The PRESIDENT : Yes, they are acting for the Marshal now and they were acting as captors then.

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Mr. MACKINNON : They are acting as captors when they seize it ; but then they apprise the Marshal that they have seized it, and that is the handing over under the Naval Prize Act, and technically the goods or the ship then come under the custody of the Marshal, but physically nothing happens, because the Marshal then uses the Customs officers to carry out in the ports his duties as Marshal. I submit that the captors were done with the thing on November 28, the day when the Marshal says he received notice from them that they had seized, and that they had handed over to him. My Lord, apart from this one case about damages being granted against the Marshal, I cannot find any other authority as to his liability.

Mr. DUNLOP (for the claimants) said that if all the parties in this case had acted unreasonably, but each party had acted within his legal rights, the shipowners would have claimed freight at Falmouth, because the capture put an end to the contract, and in a court of common law they would have had to bring an action claiming a declaration that they had a lien on this cargo, and they would have had to ask for payment out of the cargo, for an amount for which the Court thought that they had a lien. Fortunately, until now, there had been no conflict between the common law rights of shipowners and their rights in the Prize Court. Some attempt had been made by shipowners to bring their claims for freight in connection with these prize cargoes into the Commercial Court, but it was much more desirable that they should ask for redress here than that they should resort to whatever common law rights their contracts might give them in virtue of their liens on the cargoes. Therefore the shipowners came to this Court as a court of business



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equity to ask for reasonable remuneration for any services they had rendered which, in fact, had proved a benefit to the cargo. They did not here claim damages for negligence. He made no complaint with regard to the detention up to December 13, the date of the arrival at Liverpool, though he dissented from Mr. Mackinnon's proposition that the ship went to Liverpool with the assent of the shipowners. On the contrary, they desired to discharge the cargo at Falmouth, where it would, of course, have realized sufficient to reimburse them for their freight. But they did not stand upon their strict legal rights. The Marshal decided that it would be better to send the ship to one of three ports—Liverpool, Glasgow, or Leith. Liverpool was the nearest, and the shipowners only consented to Liverpool as the least objectionable of the three. But that was not the real point of the complaint here. His first complaint was that between December 13—the date of arrival at Liverpool—and January 16, according to the Marshal's statement, nothing whatever was done either to sell the cargo or to get it discharged anywhere; and there would have been no difficulty in getting the cargo sold—as indeed the cargo was sold—at Garston *ex* ship. True, there was some difficulty owing to the congestion of warehouses, and the Mersey Docks and Harbour Board took the view that it was better to use the ship as a warehouse than to use the warehouses alongside the quays on the Mersey. So nothing at all was done from December 13 to January 16, when the Marshal began to arrange for discharging the cargo. The cargo was sold on January 20 for delivery at Garston. To carry out that sale the Marshal had to arrange with the shipowners that the ship should go to Garston. They were not bound to send her there. They were entitled, so far as the freight was concerned, to remain at Liverpool, but they acted reasonably throughout. The Marshal stated that he had sold to the buyers on the

terms that the buyers should give the ship an immediate berth, because at that time he was realizing that this ship had been detained since November 27. Unfortunately, when the ship arrived at Garston there was no berth, and she had not got a berth yet. Under these circumstances he submitted that the shipowners ought to get reasonable compensation for being deprived of the use of the ship during that time. What had been done was for the benefit of the cargo, which was sold on a rising market, and, he understood, realized much more than if it had been sold on the day when the ship arrived at Liverpool. With regard to the detention since January 20 the position of the shipowners was this: They had no claim against the buyers because they had no contract with them; the only person who had a contract with the buyers was the Marshal through his brokers. The Marshal, according to the affidavit, was willing to pay the shipowners the expenses of going from Liverpool to Garston; he ought, also on the same principle, to pay the expenses of detention at Garston, looking to the buyers for reimbursement for the detention for which they were liable under the contract of sale. Whatever sum was allowed in respect of the detention after January 20 the Marshal would, no doubt, be able to recover from the buyers, who were the parties really responsible.

The PRESIDENT: I do not want to land the Marshal in all sorts of litigation. Would you like to take an assignment of this *chose in action*?

Mr. DUNLOP: Yes, my Lord.

The PRESIDENT: I have no doubt he will give it to you with pleasure—I mean if he has got any action against the buyers, any rights against the buyers for detaining the vessel.

Mr. DUNLOP: If he has made the contract that he has

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represented he has made, the assignment would give us a right to ask the buyers for compensation for this delay. Otherwise they would refer us to the Marshal, and I submit in law that is right—they have nothing to do with us.

The PRESIDENT : I have not seen the contract, you see.

Mr. DUNLOP : I have not seen it either, but I think your Lordship ought to see it, in order to see on what terms the cargo has been sold.

The PRESIDENT : It will be discharged in Garston almost at once.

Mr. DUNLOP : The ship was ordered to Garston on January 22, and the discharge has not begun yet.

The PRESIDENT : When did she arrive in Garston ?

Mr. DUNLOP : On January 30. She was ordered to go on January 22, but the authorities there would not allow her to proceed to Garston because there was no berth available for her on her arrival, so that the delay was due to there being no berth. It seems clear from the correspondence which has taken place between the shipowners and the buyers that we have no claim against the buyers. We can only look to the Marshal, and I submit—on the same principle that the Marshal is paying the expenses of going from Liverpool to Garston—that he ought to pay for the expenses of the vessel while she is at Garston, looking to the buyers to reimburse him for any expenses. The question here really is, is the Court going to give redress to shipowners who are apparently innocent, have done nothing unreasonable, have acted at any rate on the advice—if not the direction—of the Marshal of the Court, though perhaps not legally bound to do it, and have lost the benefit of their ship ?

The PRESIDENT : I rather agree, but the difficulty is that I do not want these matters to go to long references or to

be subjected to long litigation. If you can make a reasonable arrangement which is speedy and not expensive, instead of asking for an order against the Marshal, I am quite willing to allow the Marshal to pay out of the proceeds such sum as may be considered fair in all the circumstances.

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Mr. DUNLOP : That, I am sure, would satisfy my clients. The Marshal is in this position, that at present he cannot make any arrangements without your Lordship's permission.

The PRESIDENT : I refrain from making any order or decree against him. I merely permit him, in order that he may be exonerated, to pay out of the proceeds such sum as is considered by somebody to be fair in all the circumstances to pay for the use of the ship.

Mr. DUNLOP assented to the matter being left in the Marshal's hands.

Mr. MACKINNON : I do not know whether I really followed, but I understand that what your Lordship has been speaking about is as to the Marshal being allowed to pay something in regard to the arrangement after the sale between Liverpool and Garston.

The PRESIDENT : Oh, no.

Mr. MACKINNON : Your Lordship means the whole thing?

The PRESIDENT : The whole thing—not up to December 13, and not necessarily since December 13. The substance of the matter is that the vessel has been used as a sort of warehouse for a fortnight or a week, or whatever the time may be.

Mr. MACKINNON : What we were concerned to avoid was your Lordship making a decree.



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The PRESIDENT : I have said I will not. I will dismiss this as a legal claim and treat it as a summons by the Marshal asking for permission to pay out of the proceeds so much.

Mr. MACKINNON : Possibly the more convenient course will be to let it stand over, because, although the Marshal has leave to pay, he is getting leave to pay the Procurator-General's moneys, and it might stand over for him to agree or to take advice in case of any difficulty.

The PRESIDENT : Very well.

Mr. MACKINNON : Perhaps we might mention it subsequently to your Lordship—there is more difficulty on the question of principle than of actual amount.

The PRESIDENT : Yes.

Mr. MACKINNON : In justice to the Marshal, I should point out that my learned friend, Mr. Dunlop, said that nothing was done at all after the arrival at Liverpool. It is not expressly stated in the Marshal's statement, but I think it is apparent that a good deal was done.

The PRESIDENT : There has been congestion in the port, and I am quite satisfied that the Marshal has done everything he could do.

Mr. MACKINNON : Your Lordship on the claim has condemned the cargo. We hear what your Lordship has said, and acting on your permission I hope we shall be able to give satisfaction to the shipowner.

### JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*) : I have stated enough to indicate to the Court and to the public my view. I am convinced that owners of British vessels, and of allied vessels too, have been acting in a

friendly spirit in conjunction with the Marshal, and that they are always ready to do their very best to arrange matters so that the cargo or the vessel, as the case may be, may be converted into money to the best advantage. But difficulties sometimes arise. It must be understood that I am not deciding that for every day's delay or week's delay to which the vessel may be put, her owners are entitled to compensation. They are not entitled to anything in law at all; but it is reasonable that the readiness with which the owners of the vessels are willing to fall in with arrangements which the Marshal desires to make in the interests of all should be remembered, and that he should be permitted to pay some reasonable sum out of the proceeds in Court to recompense the shipowners for any losses which they may suffer. I make no order against the Marshal; but I have no doubt that the parties will be able to agree upon some reasonable compensation to the shipowners, and when the parties have so agreed I will authorize the Marshal to pay the sum so agreed out of the proceeds of the cargo.

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#### COUNSEL

For the Crown... .. *F. D. Mackinnon, K.C.*  
*T. H. T. Case.*

For the Shipowners ... .. *C. Robertson Dunlop.*

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#### SOLICITORS

For the Crown... .. *The Treasury Solicitor*  
*for the Procurator-General.*

For the Shipowners ... .. *William A. Crump & Son.*



Belgian Sailing Ship  
**"KWANGO."** 1886 Tons.  
 (Part Cargo *Ex.*)  
 (J. KRAMER, *Master.*)

*Owners* : Entreprises Maritime Belges, Société Anonyme,  
 Antwerp.

*Belgian Vessel—Enemy Cargo—British Pledgees—Diversion  
 by Pledgees to British Port—Cargo condemned—Freight repaid to  
 Pledgees.*

The *Odessa* (1914), ante, Vol. I., page 301; [1915] P. 52 followed.

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 —  
 Before the  
 Right Hon.  
 Sir Samuel  
 Evans,  
 President of  
 the Probate,  
 Divorce, and  
 Admiralty  
 Division.

Mr. LEWIS NOAD moved, on behalf of the Procurator-General, for the condemnation of a parcel of nitrate of soda, contained in 20,535 bags, part of the cargo of the Belgian sailing ship *Kwango*. The nitrate was shipped in Chile for Antwerp, and the vessel was diverted to the port of London, after Messrs. J. Henry Schröder & Co., bankers, of London, had communicated with the Admiralty giving particulars as to the ultimate destination of the goods, which were shipped by H. Fölsch & Co., of Valparaiso, and were consigned to that firm's Hamburg house.

There was a claim to the cargo by Messrs. J. Henry Schröder & Co., who were the pledgees of the bill of lading.

Mr. C. ROBERTSON DUNLOP (for Messrs. J. Henry Schröder & Co.) : The only difference between the present case and the *Odessa*\* is that the *Kwango* is a Belgian ship, whilst the *Odessa* was a German vessel. The case of the *Cape Corso*,† a British ship, is really the one in point.

\* (1914), ante, Vol. I., page 301; affirmed by the Privy Council November 11. 1915. The proceedings on appeal are reported in this Volume.

† (1914), ante, Vol. I., page 301.

Messrs. Schröder, in conjunction with the Admiralty, caused the *Kwango* to be diverted to London.

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In other cases where Messrs. Schröder have sent ships containing their cargoes to neutral or allied ports, I am told their cargoes have not been condemned. Where their cargoes have been diverted to English ports they have suffered for their patriotism. But I cannot claim the release of the cargo on that account, in view of what your Lordship has held in the case of the *Odessa*.

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Messrs. Schröder claim out of the proceeds of the cargo freight which they have paid and also a certain insurance premium. Under the bill of lading and the charter-party one-third of the freight was payable on the arrival of the vessel at Antwerp, or the nearest safe port. The ship having been diverted from the Channel to the Thames, London was treated as the port of destination, and Messrs. Schröder, as holders of the bills of lading, paid one-third of the freight, amounting to £650.

The claim for insurance arises in this way. Owing to the congested state of the port of London the vessel was delayed at Gravesend. The result was that everybody concerned got the benefit of the ship for a month without any payment to the shipowners, and during that month Messrs. Schröder insured the cargo, the *Odessa* at that time not having been decided. The amount of the premium was £65 12s. 7d., and I ask that this sum, in addition to the £650, should be paid to Messrs. Schröder out of the proceeds of the sale of the cargo.

The PRESIDENT: Do the shipowners claim freight here?

Mr. DUNLOP: No. There may be a question as to the freight payable to the shipowners upon the final discharge of the cargo. But that, no doubt, will be dealt with by the Marshal, if your Lordship condemns the cargo.



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Mr. NOAD : I do not think there is any question in regard to the freight. That is covered by the decision in the case of the *Juno*.\* As to the insurance, the Admiralty Marshal holds a floating insurance policy on which he makes declarations from time to time. Therefore, the insurance effected by Messrs. Schröder is a duplication. The Admiralty Marshal made his declaration immediately the cargo was seized on December 10.

The PRESIDENT : What is the month covered by Messrs. Schröder's insurance ?

Mr. DUNLOP : From December 21.

The PRESIDENT : That will not do. The goods were then already covered by insurance.

#### JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*) : I condemn this cargo as enemy property upon the same ground as in the *Odessa*.† The fact that it was laden on a Belgian vessel makes no difference. I order that the £650 already paid on account of freight be repaid out of the proceeds to Messrs. Schröder, all other questions of freight being reserved. But I make no order for the repayment to them of the insurance premium.

Mr. DUNLOP : With regard to the question of insurance, as there was a double insurance the Marshal would be entitled to recover back any premium he had paid.

The PRESIDENT : Why should the Marshal do it ? You had better recover the premium paid by you. The Marshal has quite enough to do. If you can recover it, do so.

\* (1914), ante, Vol. I., page 177.

† (1914), ante, Vol. I., page 301 ; on appeal, post, in this Volume.

Leave to appeal was given on the main question of Messrs. Schröder's right to the cargo as pledgees.

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## COUNSEL

For the Crown           ...   ...   ... *Lewis Noad.*  
For the Claimants   ...   ...   ... *C. Robertson Dunlop.*

## SOLICITORS

For the Crown	...	...	<i>The Treasury Solicitor for the Procurator-General.</i>
For the Claimants	...	...	<i>Thomas Cooper &amp; Co.</i>



British Steamship  
**“CORNICAN PRINCE.”**

2776 Tons.

(G. O. JONES, *Master.*)

*Owners:* Prince Line, Ltd., Newcastle-on-Tyne.

This case is also reported

**84 L. J. P.** 121.

**31 T. L. R.** 257.

**112 L. T.** 475.

**1 Trehern,** 178.

**59 S. J.** 317.

*British Ship—Seizure and Sale of Cargo—Release of Proceeds to Russian Claimants—Caveat entered by Shipowners for Freight and Expenses—Action by Russian Claimants in King's Bench Division for Declaration—Jurisdiction of Prize Court to determine Rights of Parties.*

*Held* that, notwithstanding the release by the Crown of the proceeds of a cargo seized as prize, a claim by the shipowners for the payment of freight, &c., out of the proceeds was a matter to be dealt with by the Prize Court, and not by a Court of common law.

This was an application adjourned from February 1, 1915, as to payment of freight.

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—  
Before the  
Right Hon.  
Sir Samuel  
Evans,  
President of  
the Probate,  
Divorce, and  
Admiralty  
Division.

Mr. MAURICE HILL, K.C., for the owners of the *Corsican Prince*, said his clients claimed freight, demurrage, and expenses in connection with a cargo which was seized as prize, and which, as to the greater part of it, had not yet been dealt with by the Court. No appearance and no claim had been entered, the six months having expired as to the two portions claimed by the Russian Bank for

Foreign Trade and the Société Générale. The case had been restored by consent of the Court.

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The case came before his Lordship in Chambers last week, and it was adjourned to consider the question whether this claim ought to be dealt with in this Court or whether it was a claim which ought to be referred to a Court of common law. His own contention was that it was a case entirely for the Prize Court and not at all for any other Court. It would be subversive of prize practice and prejudicial to uniformity of Prize law if any other course were followed.

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In July last the *Corsican Prince* was under charter to a firm at Odessa and loaded at Nicolaieff a cargo of 250,000 poods of barley. The loading was finished on August 3, 43 bills of lading being signed, as loading proceeded, for Hamburg. The Russian authorities would not permit the ship to leave for Hamburg with the cargo, but would have permitted her to leave without the cargo. The ship would, if it had discharged the cargo, have been free to go away and get profitable employment.

Negotiations were going on between the Foreign Offices of England and Russia with regard not only to this ship, but as to a number of other ships in a similar position, with the object of diverting the cargoes to the United Kingdom. On September 13 the ship was allowed to sail on an undertaking to call at Malta, Gibraltar, and Falmouth, and to keep the British Admiralty informed.

On October 5 the ship arrived at Falmouth and was ordered by the Marshal to Liverpool, where she arrived on October 7. The cargo was detained, and on October 29 was formally seized as a prize. An order for sale was made on the application of the Marshal, no one appearing to oppose it, and the proceeds of the sale had been paid into this Court. On November 12 a writ was issued in the Prize Court against the whole cargo.



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In the meantime the Russian Bank for Foreign Trade had claimed to be interested in a portion of the cargo. This bank had been in communication with the owners of the ship while it was on its way to Falmouth. They asked, on September 28, to be kept posted as to the movements of the ship. The London agents of the Prince Line, who were the owners of the ship, kept them informed as to the departure from Malta and the procedure to be adopted on arrival at Falmouth, and asked as to the bills of lading, but could not inform the bank whether the cargo would be dealt with by the Marshal. The bank informed the ship-owners that the bills of lading had been forwarded to a bank in South Germany. They wished to know when the ship would leave Falmouth for its ultimate destination. The Russian Bank and the Société Générale then made application to the Procurator-General, who consented to a release, although, as far as could be seen, the bank had not got the bills of lading.

On November 14 an order was made, by consent of the Procurator-General, for the payment out to the Russian Bank for Foreign Trade of the proceeds of the sale of 51,500 poods (subject to any rights as to freight which the ship-owners might have over the goods at the date of the seizure), and on November 16 a further order was made in favour of the Société Générale in respect of 46,280 poods. Two-fifths of the cargo were, therefore, dealt with under these two orders, leaving three-fifths not yet dealt with by the Court, and so far no claim had been put in with respect thereto.

On December 10 the owners of the ship entered an appearance in the prize proceedings, and entered notice for a caveat against the payment out of the money, and filed a claim amounting in the total to £3,495 17s. 10d. for freight, expenses of diversion of the ship to Liverpool, compensation for detention at Nicolaieff, &c. They were

claiming for delay on the voyage. This summons has been adjourned.

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He submitted that the question involved was purely one for the Prize Court, and could not be decided by any other jurisdiction and Court. The claim of the shipowners had been questioned, and a writ was issued in the King's Bench Division on January 22 claiming a declaration that the Russian Bank were entitled to their claim in respect of the cargo free of any claim for freight, and the owners of the ship thereupon took out a summons in the King's Bench Division for a stay of execution.

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The PRESIDENT asked what would be the position of the Prize Court in the event of such a declaration.

Mr. HILL said the difficulty was to see how the King's Bench Division could make any order at all in prize unless it was acting as a Prize Court, which he submitted it was not. Such a conflict of authority would be unfortunate.

The PRESIDENT : The only law it administers is municipal law.

Mr. HILL : Precisely. It cannot deal with any matters arising in prize law.

Mr. BUTLER ASPINALL, K.C. (for the Russian Bank for Foreign Trade) : My proposition is that, in view of the fact that there has been a voluntary release of the capture of the particular goods in dispute, your Lordship ceases to have jurisdiction as a Prize Judge. I think that is the logic of the position.

Mr. HILL : My friend may have the logic of the case on his side, but the law is in the contrary direction. The Russian Bank have asked for the transfer of the question to the Commercial List, but I submit that the Prize Court is the only Court which can deal with it, and so establish uniformity in Prize law.



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Mr. HILL quoted a number of authorities to show that the question of Prize and its consequences was solely and exclusively a matter of Admiralty jurisdiction. There were cases which laid it down that the question of freight, demurrage and the like had been dealt with by the Prize Court, quite irrespective of whether the cargo was condemned by the Court, or irrespective of whether it was still in the hands of the Court.

There were quite a number of instances where freight and expenses had been awarded, though the ship's goods and the ship had been restored. That indicated that the jurisdiction of the Court arose upon the capture. The capture was what gave the Court jurisdiction, and from that time it had all the jurisdiction in regard to capture and all the consequences of capture. There was the case of the *Copenhagen* ((1799), 1 Ch. Rob. 289; 1 E.P.C. 138), where both the ship and cargo were restored, but where the Prize Court decided the question as to freight and demurrage as between the shipowner and the cargo-owner.

He submitted that the statutes had designedly upheld the contention which he was putting forward. The Naval Prize Act of 1864 made the High Court of Admiralty the Prize Court. Then came the Judicature Act of 1891, which, although it said the High Court of Justice was to be the Prize Court, yet assigned that jurisdiction to the Probate, Divorce and Admiralty Division.

The other authorities cited by Mr. Hill were :—

*Le Caux v. Eden* (1781), 2 Douglas 594.

*Lindo v. Rodney* (1782), 2 Douglas 612 n. (4th ed.).

*Faith v. Pearson* (1815), 4 Camp. 357.

*The Anna Christiana* (1778), Hay & Marriott, 161.

*Smart v. Wolff* (1789), 3 Term R. 323.

*The Racehorse* (1800), 3 Ch. Rob. 101; 1 E.P.C. 261

*The Martha* (1801), 3 Ch. Rob. 106 n.; 1 E.P.C. 263 n.

*The Isabella Jacobina* (1801), 4 Ch. Rob. 77.

The *Fortuna* (1802), 4 Ch. Rob. 278; 1 E.P.C. 392.

The *Diana* (1803), 5 Ch. Rob. 59; 1 E.P.C. 424.

The *Twilling Riget* (1804), 5 Ch. Rob. 82; 1 E.P.C. 430.

The *Hoffnung* (1805), 6 Ch. Rob. 231; 1 E.P.C. 550.

The *Friends* (1810), Edw. 246; 2 E.P.C. 48.

The *Antonia Johanna* (1816), 1 Wheaton 159.

The *Nassau* (1866), 4 Wallace 634.

Story's *Prize Courts* (Pratt's edition), pp. 30, 31.

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Mr. HILL concluded: I contend that this Court, and this Court alone, has jurisdiction in all matters arising out of prize, that if the High Court may be a Prize Court, yet all the jurisdiction assigned to it must be exercised by this Division, and that that jurisdiction applies not only to the question of prize or no prize, but to all the consequences of prize—whether it is in the custody of the Court or not, or irrespective of whether it is condemned as prize or ordered to be restored. In this particular case the only proper Court in which this question can be litigated is this Court, because the Russian Bank have themselves submitted to the jurisdiction of this Court. They entered an appearance in these prize proceedings. They got their order for release on the condition that the question of freight was reserved to this Court. Speaking generally, it is a very important matter, from the point of view of keeping a uniform law in prize matters, that your Lordship's right should be maintained.

Mr. BUTLER ASPINALL said he agreed with a great deal of what his learned friend had said with regard to the matter under discussion. His own case was that this Court had, of course, jurisdiction in prize matters, and he quite recognized that it had not only jurisdiction in prize matters, but in all matters that could be called ancillary to prize matters, or which were directly, or perhaps almost indirectly, connected therewith.



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But in this particular case his point was that the captor had seen fit to withdraw this property from the Prize Court, and from that time henceforth it ceased to be the subject-matter of prize. He cited :

*Hudson v. Guestier*, (1808), 4 Cranch, 293 ;

*The Two Friends* (1799), 1 Ch. Rob. 271 ; 1 E.P.C. 130 ;

*Luke v. Lyde* (1759), 2 Burr. 883 ;

*Upton's Law of Nations*, 3rd ed., 389.

Owing to the machinery which existed in the Prize Court—the machinery of caveat—Mr. Hill's clients were able to keep the property in the possession of the Court. Although it was the wish of the Crown to take this matter out of the Prize Court, nevertheless by reason of this machinery of caveat the shipowners were enabled to keep it physically in possession of the Court, but he submitted that the outcome of their being able to take advantage of the machinery of the caveat did not in any respect alter the rights of the parties.

Mr. Hill had drawn attention to cases where it had been laid down that it was essential for this Court to determine the question whether the thing was prize or not prize, and that even where the Court had come to the conclusion that it was not prize, yet the Court had exercised the right as between the Crown and private individuals, and even between the shipowner and the cargo-owner. But there was no case like the present case, where after proceedings had been instituted the captor had seen fit to withdraw and release the cargo.

The captor did not ask the Court to determine whether this was prize or not. What he said was : " I give it up ; I return it. As far as I am concerned I do not ask this Court further to exercise any jurisdiction in prize."

His submission under those circumstances was that from that time onwards any dispute that might arise between the persons interested in that which had been cap-

tured was a matter between private individuals, to be determined by the Courts according to the municipal law of the country.

Mr. Hill had shown great research, but it was obvious that there was no case like the present one. The letter which had been written by the Procurator-General in regard to the case was to this effect :

We are going by our action to restore you to the position in which you were at the date of the seizure.

The letter did not further Mr. Hill's contention that this was a prize matter. His Lordship was in the position of being able to remove the caveat and give back the cargo. He was not there endeavouring to bring about a state of things which would cause conflict between his Lordship's Court and the King's Bench Court, but what he was saying was that this was not a prize matter, and therefore that as Prize Judge his Lordship had no jurisdiction.

The PRESIDENT : What you say is that it ceases to be a prize matter immediately all these things are released ?

Mr. ASPINALL : Yes, from the time the captor elects to withdraw, and ceases to invoke the jurisdiction of the Prize Court.

The PRESIDENT : What are you going to say in the King's Bench action ?

Mr. ASPINALL : What we seek to say in the King's Bench is that, in view of the contract between the parties contained in the bill of lading, this contract was not carried out, and therefore they are not entitled to freight.

The PRESIDENT : And you may succeed or you may fail ?

Mr. ASPINALL : Yes.

The PRESIDENT : If you succeed, you pay no freight ?

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Mr. ASPINALL : Yes, that is so. If I succeed, I pay no freight. If I fail, they get everything ; their bill of lading freight.

The PRESIDENT : Then it is all or nothing ?

Mr. ASPINALL : Yes.

The PRESIDENT : And you will have to submit to pay all or you may have to pay nothing.

Mr. ASPINALL : Yes. I submit that the voluntary discharge of the captured vessel causes this Court to lose its jurisdiction. Your Lordship cannot go into this matter unless you have ordered either condemnation or release.

Mr. HILL, in reply, said that his learned friend's main point was that it made all the difference to the jurisdiction of this Court that the captor had chosen to withdraw his claim in prize. He, however, submitted that as soon as the property was taken as prize, certainly as soon as that property was seized in prize, the Court had jurisdiction over all the consequences of the taking of the prize.

That being the case, his contention was that the jurisdiction of the Court was to be exercised not only for the benefit of the captor, but for the benefit of all persons who had claims in respect of the property taken, and that it was not within the power of the captor to deprive the Court of jurisdiction by saying he would withdraw the claim. The captor had put the matter in the jurisdiction of the Court, and before he could withdraw he must get the assent of the Court to withdraw. The Court would only give its assent if the interests of all parties were protected. It was immaterial whether the capture was withdrawn or not.

It was said that if one got an order for release, then everything ought to be put back as if no prize proceedings had been taken at all. But how was that going to operate ?

If everything was to be put back and the parties were in the same position as if there was no capture, then the ship-owners must be put back into possession of the cargo, and here they could not be put back into that position.

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The PRESIDENT : You mean they have a lien for freight ?

Mr. HILL : Yes, and if you are to put things back you must restore the cargo to their possession. You cannot do that, and that is where the Prize Court comes in and exercises equitable rules.

Mr. L. F. C. DARBY, for the Société Générale de Paris, acting as agents for the International Bank of Commerce, Petrograd, said, in reply to his Lordship, that his clients were quite satisfied that the question of freight should be dealt with by his Lordship. He adopted, if necessary, Mr. Hill's argument.

The PRESIDENT : This is a matter of some importance. I should like to put my reasons in proper form, and I shall in all probability give judgment next Monday.

Mr. HILL : The summons in the Commercial Court will stand over ?

The PRESIDENT : Yes. I have already spoken to Mr. Justice Bailhache about the matter.

### JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*) : This is a summons which came before me in Chambers, and which I adjourned into Court for argument. It is a summons issued by the Prince Line, Ltd.—the owners of a British vessel, the steamship *Corsican Prince*—in effect asking for directions for the assessment of the amount of freight and other moneys claimed by the shipowners, and

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for payment of the amount so assessed out of the proceeds of the cargo now in Court in these prize proceedings.

Part of the cargo was claimed by the Russian Bank for Foreign Trade (hereinafter referred to as "the Russian Bank"), and a consent order was made for payment out to the bank of part of the proceeds of the sale of the cargo upon the terms, and in the circumstances, which will be referred to later. A caveat against payment out without notice was afterwards entered on behalf of the shipowners, in accordance with the Prize Court Rules. Later a writ was issued in the King's Bench Division by the Russian Bank against the shipowners, in which a declaration as to the rights of the parties was claimed, and a summons to stay that action was issued, which now stands adjourned.

The matter which now arises for decision is whether the claim of the shipowners, and the questions as to the rights of the shipowners and the cargo-owners in respect of the proceeds, are to be determined in a common law Court—in the King's Bench Division—or in the prize proceedings in this Division.

I apprehend that the principles and practice governing this matter are the same since the assignment to this Division of the Prize Court jurisdiction of the High Court, under the Judicature Act, 1891, as in former times, when the jurisdiction in prize was vested in and exercised by the High Court of Admiralty.

The subject is one of general importance, affecting our judicature; and I propose in the first place to deal with it upon lines applicable to proceedings of this nature generally; and then to state the particular facts of this case to which the principles and practice governing such cases have to be applied.

Mr. Maurice Hill, in his argument on behalf of the shipowners, cited many authorities for the proposition that this Court, exercising its prize jurisdiction, has the exclu-

sive right to determine such questions as those in issue, and not a common law Court; and that such determination should be in accordance with the Prize law, and not with the common or municipal law. It has been my duty to examine those authorities, and others dealing with or throwing light upon the subject. Having done this, it does not appear to me to be necessary or useful to go through the cases in detail, because the examination of them shows that the results which are summarized in text books of various authors—themselves authorities of acknowledged renown—are abundantly justified by the decided cases.

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Mr. Justice Story, who as an exponent in treatises and judgments of matters relating to Prize law is hardly second to Lord Stowell himself, in his *Notes on the Principles and Practice of Prize Courts*,\* writes as follows :

When once the Prize Court has acquired jurisdiction over the principal cause, it will exert its authority over all the incidents. It will follow . . . prize proceeds into the hands of agents or other persons holding them for the captors, or by any other title. . . . It may also enforce its decrees against persons having the proceeds of prizes in their hands notwithstanding no stipulation, or an insufficient stipulation has been taken on a delivery on bail; for it may always proceed *in rem* where the *res* can be found, and is not confined to the remedy on the stipulation; and in these cases the Court may proceed upon its own authority *ex officio*, as well as upon the application of parties; nor is the Court *functus officio* after sentence pronounced, for it may proceed to enforce all rights and issue process therefor, so long as anything remains to be done touching the subject matter.

The Prize Court has also . . . exclusive authority as to the allowance of freight, damages, expenses, and costs in all cases of captures, and though a mere maritime tort unconnected with capture *jure belli* may be cognisable by a Court of Common Law; yet it is clearly established that

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\* Pratt's Edition, page 30.



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all captures *jure belli*, and all torts connected therewith, are exclusively cognisable in the Prize Court.

And in a decision of the Supreme Court of the United States, in which Mr. Justice Story delivered judgment, he says :

For if the Admiralty has, as it is conceded on all sides it has, jurisdiction over the incidents as well, as the principal matter of prize, it must be just as much exclusive in the first case, as in the last. (*Maisonnaire v. Keating* (1815), 2 Gallison, 325, at p. 343.)

So Chancellor Kent, in his *Commentaries on American Law*, says :

It is a principle perfectly well settled, and constantly conceded and applied, that prize courts have exclusive jurisdiction, and an enlarged discretion, as to the allowance of freight, damages, expenses, and costs, in all cases of captures, and as to all torts, and personal injuries, and ill-treatments, and abuse of power connected with captures *jure belli*. (12th ed., by Mr. Justice O. W. Holmes, p. 400.)

This passage was cited with approval in 1868 by the Supreme Court in the *Siren* ((1868) 7 Wallace, 152, at p. 161). One more passage may be cited from Halleck's work on International Law (4th ed., Vol. II., p. 433) :

Prize Courts also have exclusive jurisdiction, and an enlarged discretion as to allowance of freight, damages, expenses, and costs, and as to all torts, personal injuries, ill-treatments, and abuse of power connected with maritime captures *de jure belli*. . . . This rule rests upon the ground that where the Prize Court has the sole and exclusive jurisdiction of the original matter, it ought also to have such jurisdiction of all its consequences, and of everything necessarily incidental thereto. The Courts of Common Law in England have no jurisdiction at all of such incidental questions, and this doctrine has been reaffirmed by the Courts of the United States.

In the leading case of *Le Caux v. Eden* ((1781),

2 Douglas, 594), Mr. Justice Buller, in a judgment which deals exhaustively with the subject, says :

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The principle is, that the question "*prize or not prize*," and the consequences of it, are conusable solely in the Admiralty Court; the true reason of which is, that prizes are acquisitions *jure belli*, and the *jus belli* is to be determined by the law of nations, and not by the particular municipal law of any country (p. 609).

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Lord Mansfield (who was a party to the decision in *Le Caux v. Eden*), in the history he gave of the Instance and Prize Jurisdictions of the Court of Admiralty in *Lindo v. Rodney* ((1782), 2 Douglas, at p. 614), said :

The whole system of litigation and jurisprudence in the prize court is, peculiar to itself; it is no more like the court of Admiralty, than it is to any court in Westminster Hall.

And after describing some of the matters with which the Prize Court had to deal, he added :

These views cannot be answered in any court of Westminster Hall, and, therefore, the courts of Westminster Hall never have attempted to take cognizance of the question "*prize or not prize*," not from the locality of being done at sea, as I have said, but from their incompetence to embrace the whole of the subject.

The decision in *Le Caux v. Eden* was that an action for false imprisonment would not lie at common law where the imprisonment was in consequence of taking the ship as prize, although the ship had been acquitted and restored, and the captor had been condemned in costs and damages in the Prize Court. More than 30 years afterwards came the case of *Faith v. Pearson* (1815) (4 Camp., 357), which carried the doctrine of the exclusive jurisdiction of the Prize Court still further; because in that case (which was an action at common law for trespass for seizing ship and cargo) the captor, who found he had made a mistake in capturing the ship, had given her up without having



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instituted any proceedings against her in the Court of Admiralty.

In deciding that the common law Court had no jurisdiction, Chief Justice Gibbs said :

The moment it appears that the ship was seized as an enemy, there is an end of this action. Although the defendant had no probable cause for what he did, he is only amenable in the court of Admiralty. I well remember the case of *Le Caux v. Eden* being decided. The decision was approved of at the time, and has been adhered to ever since. The principle there laid down fully applies to the action we are now trying. If the ship is actually seized as prize, although she is released by the captor without being libelled in the Admiralty court, the courts of common law have no jurisdiction upon the subject. . . . We are incompetent here to consider whether the captor was excusable for what he did; and if he was not, what compensation he ought to make to the parties injured. I conceive that they are by no means without remedy, and that proceedings may be originated in the Admiralty court on the part of the captured. There the question of prize or not prize will be properly discussed, the existence of probable cause will be proved or negatived, and by a single decree justice will be done to all concerned.

The Prize Courts have constantly dealt with claims for freight and damages where ships or cargoes have been captured or seized, not only as between captors and owners, but also as between owners of ships and owners of cargo; and have adjudicated upon such claims whether the ship or cargo had been released, and when both ship and cargo had been released; and apparently no action involving questions in similar cases was brought in any common law Court.

And this is obviously for grounds solid in justice and convenient in practice, because the two Courts administer two different codes or systems of law. The Prize Courts deal with claims in accordance with the law of nations and upon equitable principles freed from contracts, which

almost always cease to have effect upon capture or seizure by reason of the non-appearance or non-completion of the contract of affreightment; whereas common law Courts would only determine the consequences of the strictly legal contractual obligations of the parties. The King's Bench Courts would either give the claimants for freight the whole or nothing, according to whether the contract of affreightment had been performed or not. But the Prize Court takes all the circumstances into consideration and may award, as it has done in decided cases, the whole of the freight; or a moiety; or a sum *pro rata itineris*; or it may discard the contract rate altogether even as a basis for assessment or calculation (vide the *Twilling Riget* (1804), 5 Ch. Rob. 82; 1 E.P.C. 430); or it may withhold or diminish the sum by reason of misconduct, as, e.g., resistance to search, or spoliation or non-disclosure of papers.

And we find that in accordance with the principles, precedents, and practice which have established the exclusive jurisdiction of the old High Court of Admiralty, to which the Admiralty Division of this Court has succeeded when sitting as a Prize Court, the Prize Court Rules have been framed for this Court, and have been made by the Privy Council under the Prize Courts Act, 1894, and not by the Rule Committee, which frames the Rules for the High Court. It is not necessary to refer further to these Rules; but attention may be directed to Order XLV., which provides that in the absence of prescribed rules the practice of the late High Court of Admiralty in prize proceedings shall be followed, or such other practice as the President of this Division may direct.

It may also be noted that the appeal from decisions of this Court on all questions, claims for freights included, is to the Judicial Committee of the Privy Council; whereas if similar questions could be tried in the Commercial Court

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or any Court of the King's Bench Division, the appeal would be to the Court of Appeal or to the House of Lords.

This Court has also its special officers, like the Registrar and merchants and the Admiralty Marshal, and its special machinery for dealing with all such matters as may arise in prize proceedings.

I have dealt with the important question of jurisdiction generally. But, in truth, Mr. Aspinall, for the claimants, did not dispute the main propositions which have been stated, but contended, as I understood, that where, as in this case, the captors, or the Crown after seizure released the goods, not only had the King's Bench Courts jurisdiction to deal with the claim for freight, but that they alone had the jurisdiction, to the exclusion of this Court, even when the proceeds of the cargo seized and sold were in the hands of this Court. This contention is, in my view, quite unsound. A somewhat similar argument was put forward in *Le Caux v. Eden* ((1781), 2 Douglas, 594) on the ground that the ship had been declared by the sentence of the Prize Court to be no prize; but it did not prevail.

As I have before pointed out, the Prize Court exercised jurisdiction, and exclusive jurisdiction, where the subject-matter had been acquitted, or released, and it has been held that such jurisdiction was vested in it, even when captures had been abandoned without any proceedings having been instituted at all.

When the particular facts of the present case are looked at, it is as clear as light that this Court alone has jurisdiction to deal with the claim for freight, and that it would be most inconvenient if it were otherwise.

The essential facts, very shortly stated, are as follow : The ship's cargo consisted of 250,000 poods of barley. It was loaded at Nicolaieff, the loading being completed after war was declared between Russia and Germany. It was

all consigned to Hamburg. The Russian authorities raised difficulties about the ship leaving, but afterwards allowed her to sail, on an undertaking by the master to call at Malta, Gibraltar and Falmouth. She arrived at Falmouth and was ordered by my Marshal to Liverpool. She was detained and afterwards, on October 29, her cargo was seized. Upon the application of the Marshal, an order was made by this Court for the sale of the cargo to prevent its deterioration, and for the payment of the proceeds into Court.

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A writ was in due course issued by the Procurator-General, claiming the condemnation of the cargo or its proceeds as prize. The whole cargo was sold for about £29,800. The net proceeds amount to about £28,600 and are now in Court.

Appearances were entered in these proceedings by the Russian Bank, claiming as owners of part of the cargo, viz., 51,500 poods; by the Société Générale, claimants as to other parts, viz., 46,280 poods; and by the Prince Line, Ltd., as owners of the vessel. So far as I have been informed, no claims have been made in respect of the rest the cargo, over 150,000 poods, or its proceeds.

After the sale of the cargo, an order was made with the consent of the Procurator-General and of the claimants, in these terms :

Upon consent of H.M. Procurator-General, it is ordered that the Marshal do pay out to the Russian Bank for Foreign Trade the net proceeds of sale of 51,500 poods of barley, *ex* the above vessel, upon production of the copy bills of lading, payment of any charges which may have been incurred in connection with the detention thereof, and subject to any rights as to freight which the shipowners may have had over the goods at the date of the seizure thereof.

A similar order was made in favour of the Société Générale in respect of 46,280 poods.



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The Prince Line, Ltd., as claimants for freight, demurrage and charges, entered a caveat against the payment out of Court of any of the proceeds without notice to them.

After all these steps were taken in these proceedings, the Russian Bank issued their writ in the King's Bench Division. The summons to transfer the trial of the action to the Commercial Court is stayed pending this decision. The Société Générale, through their Counsel, Mr. Darby, adopted the argument of Mr. Hill, and they desire that the questions affecting them should be heard in this Court.

Upon these facts I repeat that it is clear beyond dispute that the questions to be decided between the shipowners and cargo-owners are within the exclusive jurisdiction of this Court.

I will only point out further that the Crown has full right to consent to the release of any ship or goods captured or seized, on any grounds that the Crown may see fit. Moreover, it does not by any means follow as a necessary consequence of the release that the goods were not properly seized as prize as the Crown's droits of Admiralty. In the present case, as the Empire of Russia is our ally in the war, it does not require a very vivid imagination to conceive grounds for giving up to the Russian Bank the proceeds of the portion of the cargo claimed by them, quite other than an acknowledgment of wrongful seizure. And if it be thought material, it would be quite open to anyone interested in these proceedings at any stage to allege, and to set out to prove, that the seizure of the cargo was lawful.

I give directions, therefore, that the claim of the shipowners, and all questions between them and the Russian Bank and the Société Générale, be heard in these prize proceedings. I have spoken to the judge of the Commercial Court, Mr. Justice Bailhache, and I do not anticipate that there will be any difficulty in disposing of the action in the King's Bench Division accordingly.

Mr. HILL asked for the costs of these interlocutory proceedings against the Russian Bank, pointing out that his clients had succeeded and that the question of costs was a matter of discretion for his Lordship.

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Mr. BUTLER ASPINALL, for the Russian Bank, opposed any costs being awarded at this stage, because the ship-owners, as he contended, had put forward a claim very largely in excess of anything they could hope to recover. Included in their claim was a sum of £1,850 claimed for the loss of the use of the ship. As by his judgment his Lordship had laid down a principle which would act as a guide in other cases, he submitted that it was a matter in which there should be no costs.

Mr. HILL argued that there was no reason to depart from the usual practice of giving the successful party in interlocutory proceedings their costs. Here the parties were ordinary litigants.

The PRESIDENT : These interlocutory proceedings were really rendered necessary by the course taken by the Russian Bank ?

Mr. HILL : Yes.

The PRESIDENT : I think you must have your costs, but against the Russian Bank only. It would be very hard to give costs against Mr. Darby's clients after the generous assistance they gave to Mr. Hill.

Mr. T. H. T. CASE (for the Crown) applied for the condemnation of part of the cargo in the *Corsican Prince*, viz., the parcels numbered 7, 8, 9, 10 and 11, amounting in quantity to 30,250 poods. There were originally claims by the shipowners for freight and other expenses which had been disposed of by agreement, and there was a claim by the Russian Bank for Foreign Trade and the shipper,

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but no one was appearing in support thereof. The bills of lading consigned the goods to order of the shipper (a Russian) at Hamburg.

The PRESIDENT : Very well, I condemn the goods according to the numbers on the manifest which you have produced.

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### COUNSEL

For the Crown ... .. *T. H. T. Case.*

For the Prince Line, Ltd.,  
Owners of the *CORSICAN*  
*PRINCE* ... .. *Maurice Hill, K.C.*  
*R. H. Balloch.*

For the Russian Bank for  
Foreign Trade ... .. *Butler Aspinall, K.C.*  
*R. A. Wright.*

For the Société Générale de  
Paris ... .. *L. F. C. Darby.*

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### SOLICITORS

For the Crown ... .. *The Treasury Solicitor*  
*for the Procurator-General.*

For the Prince Line, Ltd.,  
Owners of the *CORSICAN*  
*PRINCE* ... .. *King, Wigg & Brightman, for*  
*Wilkinson & Marshall, New-*  
*castle-on-Tyne.*

For the Russian Bank for  
Foreign Trade ... .. *Coward & Hawksley, Sons &*  
*Chance.*

For the Société Générale de  
Paris ... .. *Loughborough, Gedge, Nisbet &*  
*Drew.*

## Norwegian Steamship

“**ANTARES.**” 1840 Tons.(Part Cargo *Ex.*)(H. SCHYTZ, *Master.*)

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*Owners:* Damsk.-A/S Antares (A. Kroger), Christiania,

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The Cases of the following Vessels were included :

“**NORHEIM,**” Norwegian Steamship, 1403 Tons.(Part Cargo *Ex.*) H. HANSEN, *Master.**Owners:* Harloff & Rodseth m.F., Bergen.“**FRANCISCO,**” British Steamship, 4760 Tons.(Part Cargo *Ex.*) H. RUNTON, *Master.**Owners:* T. Wilson, Sons & Co., Ltd., Hull.“**TORONTO,**” British Steamship, 6033 Tons.(Part Cargo *Ex.*) G. W. OWEN, *Master.**Owners:* T. Wilson, Sons & Co., Ltd., Hull.“**IDAHO,**” British Steamship, 4887 Tons.(Part Cargo *Ex.*) G. J. LOVERIDGE, *Master.**Owners:* T. Wilson, Sons & Co., Ltd., Hull.

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This case is also reported**59 S. J.** 384.**31 T.L.R.** 290.**1 Trehern,** 261.

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*British and Neutral Vessels—Seizure of Neutral-owned Copper at Sea and in British Port—Copper requisitioned by Admiralty—Prize Court Rules, Order XXIX., Rules 1 & 3—Jus Angariae—Procedure—Pleadings—Particulars.*

Order XXIX., Rule 1, of the Prize Court Rules requires the Judge before final decree to make an order for delivery to the Admiralty of a ship which the Admiralty desire to requisition, if



there is no reason to believe that the ship is entitled to be released; but there is a proviso to the Rule that no order shall be made in respect of a ship which the Judge considers there is good reason to believe to be neutral property.

Under Order I., Rule 2, the term "ship" both in the Rule and in the proviso thereto includes goods. But the Court held that by reason of the proviso there is no right under Order XXIX. to requisition cargo seized on suspicion of being contraband, when it is admitted to be the property of neutrals.

The Court will not, except in very special cases, order the delivery by the captors of pleadings or particulars in Prize Court proceedings.

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In these cases motions, adjourned from February 22, 1915, were made on behalf of two Swedish companies, the Aktiebolaget Svenska Metallverken and the Finspongs Metallverk Aktiebolaget, asking that orders made by the Registrar *ex parte*, releasing certain unwrought copper (parts of the cargoes of the steamships *Antares*, *Norheim*, *Francisco*, *Toronto* and *Idaho*) to the Lords of the Admiralty, should be discharged.

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Before the  
Right Hon.  
Sir Samuel  
Evans,  
President of  
the Probate,  
Divorce, and  
Admiralty  
Division.

MR. LESLIE SCOTT, K.C., M.P. (for the applicants), said that in the case of the *Antares* the Aktiebolaget Svenska Metallverken, a Swedish incorporated company, were interested in a parcel of 150 tons of copper on board the vessel, which was captured on the high seas and taken into Liverpool. The applicants were also claimants to the copper in Prize Court proceedings taken in respect of the goods, and they asked that his Lordship should set aside the order made by the Registrar *ex parte* and without notice to the claimants.

There were six parcels of copper involved in these cases. In two the Svenska Company were interested, while the Finspongs Company were interested in the remaining four. The total quantity of copper concerned in the six parcels was about 1,000 tons, worth between £80 and £100 a ton.

It was, however, necessary to take the different cases separately, and he would deal with that of the *Antares* first.

The order that was made purported to be made under Order XXIX. of the Prize Court Rules, but was, he submitted, made quite without authority, for various reasons. It was an order requisitioning the copper for war purposes for the British Government. Order XXIX. had been framed with very great care. The term "ship" had been interpreted as including "goods," and, therefore, for the purposes of the present case, "ship" must be read as "goods." Embraced in the Order were five Rules. No. 1 was as follows :

If in a cause for the condemnation of a ship in respect of which no final decree has been made, it is made to appear to the Judge *on motion* on behalf of the Crown that the Lords of the Admiralty desire to requisition the ship and that there is no reason to believe that the ship is entitled to be released, he shall order that the ship shall be appraised, and that upon payment into Court on behalf of the Crown of the appraised value of the ship the said ship shall forthwith be released and delivered to the Lords of the Admiralty.

Provided that no order shall be made by the Judge under this rule in respect of a ship which he considers there is good reason to believe to be neutral property.

In that Rule there were two conditions precedent : First, that the Lords of the Admiralty "desire to requisition the goods," and secondly, that "there is no reason to believe that the goods are entitled to be released." With regard to the proviso, his submission would be that that Rule was framed in the way it was to permit of such orders being made in regard to enemy property or, it might be, British property which was subject to confiscation for enemy trading, but that it was intended expressly to exclude contraband which was the property of a neutral.

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The PRESIDENT : Do you mean that if the property were contraband and it belonged to a neutral, it nevertheless could not be requisitioned ?

Mr. SCOTT : Yes, because until condemnation it would belong to a neutral.

The PRESIDENT : You say that assuming it was contraband and that it belonged to a neutral, the Court, under Order XXIX., Rule 1, is powerless in regard to it until it has been condemned ?

Mr. SCOTT : Yes. Rule 2 provides :

Where a ship has been condemned as prize and has not yet been sold, or where a decree for the detention thereof has been made in accordance with Order XXVIII., the proper officer of the Crown may file a notice that the Lords of the Admiralty desire to requisition the same, and thereupon a commission to the marshal directing him to appraise the ship shall issue. On payment into Court on behalf of the Crown of the appraised value the ship shall be released and delivered to the Lords of the Admiralty.

Service of this notice shall not be required before filing, but copies thereof shall be served upon the parties by the proper officer of the Crown as soon thereafter as possible.

Rule 3 said :

Where in any case of requisition under this Order it is made to appear to the Judge *on motion* on behalf of the Crown that the ship is required for the service of His Majesty forthwith, the Judge may order the same to be forthwith released and delivered to the Lords of the Admiralty without appraisement.

That applied to each of the two cases mentioned in Rule 2.

Rule 4 was as follows :

In any case where a ship has been requisitioned under the provisions of this Order and whether or not an appraisement has been made any party may apply to the Court *by motion* to fix the amount to be paid by the Crown in

respect of the value of the ship and the sum so fixed, so far as not already paid into Court, shall be paid into Court on behalf of the Crown.

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The final provision was Rule 5 :

The proceedings in respect of a ship requisitioned under this Order shall continue notwithstanding the requisition.

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By an Order in Council of September 30, 1914, the words "on motion" in Rules 1 and 3, and the words "by motion" in Rule 4, were struck out and two further Rules were added in regard to applications for the temporary user of ships or goods.\* The only point he made upon this was that Order XXIX., though the subject of reconsideration, was kept in its original form subject to the alternative he had mentioned.

The dates in the case were these : On September 21 copper was included in the list of conditional contraband, it not having been mentioned in the Declaration of London. On October 21 the bill of lading in connection with the shipment on the *Antares* was signed. The copper was shipped at New York for Gothenburg, in Sweden, to order of the shippers, the United Metals Selling Company, an American corporation. On October 26 the parcel was bought by the Svenska Company, afloat, and the "sold note" contained these words : "Guaranteed for consumption in Norway or/and Sweden." That must be a guarantee.

The PRESIDENT : Or is it the buyers' opinion ?

Mr. SCOTT said he only had the "sold note," but the "bought note" must be in the same terms. On October 29 copper was made absolute contraband, and the Order in Council was published in relation to bills of lading made out to order, with which the Court was familiar. On

\* See *Manual of Emergency Legislation*, page 366.



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November 12 the copper was seized on the high seas, the vessel being taken into Liverpool. On December 5 the Swedish Government made a prohibition against the export from Sweden of copper, and on December 11 the Norwegian Government did the same.

The ATTORNEY-GENERAL (*The Right Hon. Sir John Allsebrook Simon, K.C., M.P.*): The prohibition of December 5 only referred to copper in an unmanufactured state.

The PRESIDENT: This is described as electrolytic copper.

Mr. SCOTT: Yes, a form of raw copper. The writ, he continued, was issued in the Prize Court on December 12, and asked that the copper should be condemned as good and lawful prize on the ground that it belonged at the time of capture and seizure to enemies of the Crown, or alternatively was contraband of war. The claimants had eight days for entering an appearance, so that the time would expire on December 20. Two days before that date, namely, on the 18th, the order complained of was made, without any notice to the applicants, releasing the goods to the British Government, "it being made to appear to the Court that the 150 tons of copper are required by the Lords of the Admiralty." The order was made subject to an affidavit being delivered in support of the Crown's application.

The next day the Swedish Consul-General, having been in communication with the Procurator-General, was unable to obtain release of the copper, and consequently the applicants' solicitors entered an appearance on December 22.

On December 21 the affidavit mentioned in the order was filed on behalf of the Crown. It was to the effect that the copper was urgently required by the War Department for the defence of the realm, and that it was therefore

desired that it should be released and delivered to the Lords of the Admiralty without terms. The affidavit also mentioned that no decree had been made for the condemnation of the part cargo, although a writ asking for condemnation had been issued.

On January 21 the applicants' claim was delivered. It set out that the goods at the time of seizure were the property of the claimants, neutral subjects; that they were destined for the claimants and were at the time of seizure and still were intended to be used for the purposes of the claimants; that there was in Sweden a prohibition against the export of copper; and that in the circumstances the goods were not contraband. On January 6, in reply to a letter of the previous day asking if he were prepared to treat on the basis of a monetary claim, the Procurator-General replied that, inasmuch as the claim was not admitted, a monetary claim was not of interest to him at present.

On February 15 the claimants learned for the first time that the copper had been requisitioned by an order of the Court, though previously they had been informed that it had been requisitioned by the military authorities. The moment they learned of the order, notice of the present motion was given.

He submitted (1) that under Order XXIX. there was no power in the Court to make the order requisitioning property of neutrals; and (2) if he were wrong in his first proposition, that whether it be in respect of property of neutrals or enemy or British subjects—in any case those applying on behalf of the Lords of the Admiralty must prove to the Court that there was no reason to believe that the ship or goods was or were entitled to be released.

In regard to both those points there was no evidence before the Court justifying the order made. His third point was that by inference from Rule 2, or on general

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grounds of justice, the matter was one which ought not to have been dealt with *ex parte*.

Supposing there was before the Court the question of condemning goods documented to a neutral port, shipped by neutrals, under a contract for purchase by neutrals, the ship's papers showing the vessel bound to that port, there being no ground for attacking the documents in the case, it was quite plain that there could be no condemnation unless the Crown was able to discharge the burden of proving that, in spite of all these facts, the goods were upon a venture which would have taken them finally to an enemy destination such as would make them contraband.

But there was evidence that these goods were not the subject of a "venture with an enemy," nor going to the armed forces of the enemy Government. If there was any doubt on the question, he submitted that the Court had no power to make an order under Order XXIX., and that it was only intended that such summary power could be exercised in the case of an undefended case.

On the merits there was not a shadow of ground for the assumption that this was a case for a charge of contraband against these goods, or any other charge justifying condemnation; but he made this statement without prejudice to the submission that it was not necessary for him to go into the merits, beyond contending that the Registrar, when he made the order, had no material upon which to make it.

The PRESIDENT pointed out that under Rule 1 the Admiralty without giving reason need only say they desired to requisition the ship or goods, but under Rule 3 they must state that the ship was required for the service of His Majesty, and appraisement was dispensed with.

Mr. SCOTT said his contention was that an order could not be made unless the applicant satisfied the Court that

it was an undefended case. He next referred to the formal affidavit of Mr. Hawes, the solicitor for the applicants. It was dated February 18, and related to the conduct of the case, beginning with a communication from the Consul-General of Sweden, and the correspondence with the Procurator-General about the cargo in question. No mention was made to the deponent of the order of the Registrar as to the cargo, and it was not until February 19 that, as the result of private inquiry, he learned that such an order had been made.

Then there were two affidavits made by M. Eliel Lofgren, a member of the Swedish Bar, practising at Stockholm. The first was dated February 20, and stated that the deponent had been instructed by the claimants to proceed to England to protect their interests. He stated that the company were metal manufacturers and merchants, and the largest firm of the kind in Sweden. They had numerous large contracts on hand, including Government works for both Norway and Sweden, as well as for many private firms, requiring altogether 3,832 tons of copper. They had no desire to make any use of the copper except for their own urgent needs.

The ATTORNEY-GENERAL said he did not wish in any way to question Mr. Scott's contention that his clients in no way intended to use the copper except sincerely, honestly, and genuinely, but this was not a time for hearing the case on its merits as to the facts. The present hearing was only preliminary, and he had not come prepared for anything further than this.

Mr. SCOTT said that he was as anxious as the Attorney-General to shorten the proceedings as far as was compatible with justice to his clients; but the Attorney-General could not have it both ways. The affidavit of M. Lofgren showed the *bona-fide* character of the property, and that it was to

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be used in a neutral country, in Sweden, and not to be sent to an enemy. M. Lofgren said he had made most careful investigations of the circumstances connected with the shipment, and he was certainly convinced that none of the copper in question was intended for shipment to any enemy of His Britannic Majesty.

Mr. SCOTT then read an affidavit of Mr. Ashdown, Director of Stores, to the effect that the Admiralty had requisitioned the copper in question, which was required by the department for immediate use. His comment upon that statement, as Counsel on behalf of the Swedish company, was that it might well be that His Britannic Majesty's Government had urgent need for copper, but that was no reason why the company's copper should be taken.

The PRESIDENT: Is the copper required by them for manufacturing ammunition?

Mr. SCOTT: There is no trace, my Lord, of reference to ammunition purposes.

The PRESIDENT: So that Sweden is not in urgent need to make preparations for the defence of herself. Urgent need for purposes of defence is one thing and urgent need of copper for the purpose of making kettles is another.

Mr. SCOTT assented.

The PRESIDENT: The question is, do you want it for manufacturing or ordinary industrial purposes? If so, your difficulty will be met by showing that full compensation must be made.

Mr. SCOTT: We are dealing with rights here.

The PRESIDENT: When I say full compensation I do not necessarily mean the price of copper at the time. Compensation may mean loss through not having the copper.

Mr. SCOTT said he was instructed to say that the order must be discharged. The Swedish Minister was concerning himself in the matter, and if the order was discharged it might be possible for the Swedish Government to make some arrangement in the matter. However, he was not instructed to say whether that might be so or not. He read another affidavit by the Executive Committee of the State Commission for Industry, showing that the monthly demand of the company's works for copper was 700 tons, and that since the war began there had been a shortage of 3,000 tons. The copper, it was stated, was required for industrial purposes, and the affidavit emphasised the great necessity there was of allowing the unhindered import of copper for the purposes of industry. As qualifying his previous statement, he mentioned that a letter from the Royal Army Administration, Artillery Department, stated that they wanted 750 tons of copper for the manufacture of ammunition, and another communication stated that a further supply of copper was needed for the completion of a Swedish armoured ship.

To sum up, he submitted these facts regarding the vessel in dispute : A neutral voyage from a neutral country, with a neutral destination ; the ship's papers all in order ; not a shred of evidence produced on behalf of the Procurator-General to suggest that the destination was beyond Sweden. The claimants had put before the Court the whole outline of their case—the important needs for copper in Sweden at the present time, and the purchase for use in Sweden to carry out certain orders, a case completely negating contraband. There was no case for an order that could possibly come within the Rule, and he respectfully asked the Court to set aside the order.

The PRESIDENT : What do you say would be the result of my rescinding the order ?

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Mr. SCOTT : I do not know what the result would be. What I submit is that I am entitled as a right to have this order set aside, whatever the result may be. My submission is that there is no such right as the Procurator-General claims for pre-emption with payment of compensation. The letter of the Procurator-General of February 6 stated that the claim of the company was not admitted, and that the delivery of a monetary claim was not a matter of interest for him at present. That was saying in effect that the Crown were contending that these goods against which the writ had been issued ought to be condemned. It means : " We do not admit your claim, and if the goods ought to be condemned you will get no money." Now, the motion to-day is that the order in question should be set aside and that the goods should be restored to the company. None of the difficult questions about the onus of proof of continuous voyage or continuous transport, which were dealt with by the Declaration of London and subsequent Orders in Council, arises here.

It is not a question whether copper was put upon the list of absolute contraband or conditional contraband after the shipment of the goods or before. As a matter of fact, it was put on afterwards, and I submit that an innocent purchase before that date would make the change by the Government from conditional to absolute contraband irrelevant. The case before the Court is that of neutral goods against which there is no evidence to indicate the possibility of transport to an enemy.

The ATTORNEY-GENERAL (for the Crown) said he did not propose to enter into a detailed examination of Rule XXIX. In order correctly to appreciate Rule XXIX. he proposed to submit several propositions. There were four propositions, which he did not think could be disputed :—

(1) That a belligerent State has a right by international law to appropriate for urgent purposes of

offence or defence, subject, of course, to proper compensation, the property of neutral subjects which is not within neutral jurisdiction.

(2) That even if this right were limited to neutral property within the jurisdiction of the belligerent State, that condition is satisfied when it is neutral property which is being brought within the jurisdiction of the belligerent State by the exercise of the belligerent State's right of capture on the allegation of contraband.

(3) When that event happens and the neutral subject conceives he has a right to complain, a foreign subject cannot complain in any British Court of the seizure of his property in these circumstances, when this seizure is avowed by the British Government as an act of State. The remedy of the foreign subject in that event is a diplomatic remedy—a remedy by protest.

(4) These propositions are true of property which is not in the custody of a Prize Court.

As regarded the first proposition, it would be very strange if there was not such a right, for most undoubtedly that proposition obtained with reference to the property of British subjects.

He contended that the property of a neutral was liable to be requisitioned in the event of national emergency, in a case like the present where the cargo was not only in this country but was in the custody of the Prize Court. But, of course, if the Executive were to send their officers, and by main force take this copper and remove it from where it was, and take it to Woolwich, where we were engaged in manufacturing ammunition, without any communication to the Prize Court, they would be doing what was obviously wrong, and would be behaving with great dis-

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respect to the Prize Court, and probably be committed for contempt. Where the Crown, exercising its undoubted prerogative, appropriated for the purposes of national defence the property of neutrals in this country, and found the property was in the custody of the Prize Court, it was proper that the Court should be notified, and make the order which would release the custody from the Prize Court officials. The right of the Crown to use property which was valuable for the purposes of national defence remained, in such circumstances, absolutely unqualified.

Supposing the Crown wanted the copper just at the moment when the Prize Court was going to deal with it and to release it, he presumed that his Lordship would say that there was no need to make an order for release as there was to be an appraisement; and in a short time they would be able to requisition the goods without reference to the Court, and there could be no ground of friction. But when they had the case of copper brought into the Court for condemnation in respect of which inquiry on the merits had not taken place, the Prize Judge might say he was satisfied that the Executive exercising the prerogative of the Crown, responsible for the defences of the country, urgently needed the article which was within the jurisdiction of the Crown; but it happened also to be within the custody of his Marshal, and consequently he would make an order that it should be released, which was at once a justification of the Crown's right to requisition and an authority to the Marshal of the Court to let the copper go. It was presumably the duty of the Marshal otherwise to hold on to the copper (unless by authority of the Court authorized to release), which might lead to friction and misunderstanding.

If it was pointed out that it was a matter of urgency, and that the Government required the copper to make ammunition, instead of making an order under Rule 1, his Lordship might order that the copper should be released as

far as the Prize Court was concerned ; at that moment the copper could be requisitioned without causing any complications. The Court would still have the duty before it of ordering the appraisement of the goods, and the value to be paid into Court. The Rule, he contended, did not affect the Crown's fundamental prerogative to appropriate the property for national uses.

The two conditions which he suggested were (1) that the Admiralty desired to requisition the copper, and (2) that the copper at the time was actually on the absolute contraband list. Moreover, there was the fact that it was going to Sweden. He did not wish to make any general accusation against a neutral nation, which was entirely friendly to us and with whom we trusted to preserve the most friendly relations, but the most friendly expressions of opinion would not alter the fact that Sweden was immediately opposite Germany, across the Baltic sea.

The PRESIDENT : And that whatever the position taken up by the Swedish Government, this copper was going to a Swedish company who might desire to make money out of it.

The ATTORNEY-GENERAL : Not only that, but it would be going to Swedish individuals, who, if they desired to trade with Germany, would be committing no wrong, as a neutral could trade with a belligerent without committing a wrong.

The PRESIDENT : At the time of the seizure, according to the date, there was no prohibition of exports from Sweden.

The ATTORNEY-GENERAL said that the Swedish prohibition was limited to the material which the country turned into pots and pans and things of that sort.

The PRESIDENT suggested that there was no guarantee against the copper being turned into shells or other forms

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of ammunition if it went to Sweden. As he understood the Attorney-General, it was his contention that neutral property was not the same as property belonging to a neutral.

The ATTORNEY-GENERAL said the term meant innocent neutral property where it referred to property not liable to seizure. Proceeding to deal with one other point, the Attorney-General said Mr. Scott was, in effect, asking the Executive Authority who had taken this copper, some of which was at this moment at Woolwich, to put it back into the hands of his clients. Was it, however, conceivable that in the course of administering the most responsible duties of this Court his Lordship would feel justified in directing the War Office or the Admiralty actually to return to the Swedish claimants not the money value, but the metal, which was claimed as a national need, so that the Executive might have it in their hands for the purpose of using it?

He continued: I do not doubt if you felt it your duty to give such directions, the authorities would receive them in the way in which I trust they always receive judicial directions, but your Lordship will forgive me for pointing out that this might lead to very serious consequences. It cannot be disputed that the Crown has the right and the duty cast upon it of taking all necessary steps for the defence of the country, and I shall be very slow to believe that any British Court would make an order which would have the effect in any way of reducing the effectiveness of the steps which they have thought it necessary to take.

The PRESIDENT said if he made an order which was not obeyed, the result would be that he would have to commit someone for contempt of court for not doing the thing which might be injurious to the country.

The ATTORNEY-GENERAL further argued that the power of his Lordship to review, correct, or alter an order already

made was a discretionary power. The order in question was made on a representation that the copper was urgently needed in this country, and there was no reason that would justify any interference with the order. But while he maintained that it was a discretionary matter, he did not give up his main contentions based on the construction of the Rules. The order was made under Rule 3, satisfying the terms of Rule 1. The property was property which the Lords of the Admiralty desired to requisition, and there was no reason to believe that it was property which was entitled to be released.

Furthermore, if the proviso to Rule 1 had any application at all to goods it must be re-written for the purpose, so as to make it run that in respect of goods the Judge was not to make an order if he considered there was good reason to believe that the goods "were innocent neutral property." He also contended that goods did not fall within the proviso and that upon all these grounds the application ought to fail.

Mr. SCOTT (in reply) said that the Attorney-General had put the case on a footing which raised questions of grave international importance. In particular Sir John had asked how much better off would the applicants be, if the order now asked for were made setting aside the original order, and he further said, "Will your Lordship do it?" He had said that the copper was at Woolwich, and that the British Government were in urgent need of it for national purposes, and asked what would be the effect of the order if made.

He (Mr. Scott) apprehended that the effect would be that the copper would be restored to the custody of the Admiralty Marshal, and if, on the hearing of the case on its merits, the claimants succeeded in obtaining an order for its release, the copper would be handed over to them. One of the causes of just pride which England had in the

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administration of its Prize jurisdiction was that the proceedings in that Court had been conducted, as all legal proceedings had been, upon the merits of the cases brought before it, according to the law applicable.

He ventured to submit that the present was a case in which his Lordship was under a grave obligation to administer justice with that strength and impartiality which had characterized the administration of justice in this war as in other wars. The Swedish company concerned did not want the money; they wanted the copper, of which they had serious need. Sweden as a country required it. The order originally made was not a matter of discretion, as the Attorney-General had contended it was. The Court was tied by certain conditions and those conditions had to be observed.

The Attorney-General had almost argued that the Court was merely a ministerial authority existing upon the *ipse dixit* of the military authorities. With that proposition he could not agree. It had also been argued that the object of the Rules was to enable an official of the Executive to give notice to the Court of the case of the Government. That was an entire misapprehension of the scope of the Rules.

The PRESIDENT mentioned that in 1870 the Germans claimed, when it suited their purposes, to sink English ships at the mouth of the River Seine, and they claimed to do so without compensation. The British Government protested and compensation was paid.

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Mr. LESLIE SCOTT, resuming his reply on behalf of the applicants, said that the Attorney-General's propositions, as he understood them, fell under two heads. He had contended in the first place that Order XXIX. of the Prize Court Rules must be interpreted in the light of *jus angariae*, or the right of angary.

The PRESIDENT : I did not so understand the Attorney-General's argument. He spoke of certain rights which the Crown had apart from Prize proceedings altogether.

Mr. SCOTT said he understood the Attorney-General to invite his Lordship to construe Order XXIX. in the light of the rules of international law existing at the time it was passed. Secondly, he understood him to say that Order XXIX. must be construed in the light of the right of angary, and that the order of the Court of December 18 authorizing the requisitioning of the goods was made in assertion of that right of the Crown, and was an executive act in the exercise of it.

The ATTORNEY-GENERAL : I did not say that at all.

The PRESIDENT : And I did not so understand the proposition.

The ATTORNEY-GENERAL : There is a sharp distinction between judicial and executive.

The PRESIDENT : Whatever the rights of the Crown may be, they purported in these proceedings to invoke Rule XXIX.

Mr. LESLIE SCOTT : My friend disavows an intention to put his contention forward with that crudity with which I have done, but I submit that is the effect of what he submitted. He went on to say that the order made was not an order *inter partes*, but was in fact an order which the Court had no option but to make upon the demand of the Executive Officer of the Crown. If that is so, it is another way of saying that the order is not a judicial order and is not appealable. I submit it is a judicial order. The Attorney-General's main argument was that because of the right of angary Order XXIX. must be interpreted in the light of that right, and the order made must be regarded

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as having been made in the exercise of that right. He also said it is justifiable under the Defence of the Realm Act and the Regulations made thereunder. He said alternatively that, truly interpreted, Order XXIX., apart from the general rights of the Crown under Rule 1, gave the Court power to make an order within the terms of that Rule if there was any prospect of condemnation.

Again, he said that the Rule must be construed as if in front of the words "neutral property" in the proviso there was the word "innocent." Then he said, applying that interpretation to the facts of this case, there was a prospect of condemnation of the copper in question on the ground of its being contraband, because Sweden is on the opposite side of the Baltic to Germany, and the copper was going to a private individual, who might find it to his advantage to sell goods manufactured from it to Germany.

The ATTORNEY-GENERAL, interposing, said that his submission was that for the purpose of determining whether there was reason to believe that the ship was entitled to be released it was necessary to look at the facts as known to the Registrar at the date he made the order. At that date there was a case pending. He was not contending that the facts as then known, standing alone, gave the Crown the right to ask for condemnation, but he contended that at the date the order was made the matter came within Rule 1.

The PRESIDENT : The question of condemnation will have to be decided on the hearing of the Prize proceedings.

Mr. SCOTT argued that there was no power to make the order *ex parte*.

The PRESIDENT : I think there is, in a proper case.

Mr. SCOTT said that at all events, on the ground of natural justice, if an *ex parte* order were made there must be a right in the party affected to come to the Court and

litigate the order *inter partes*. Then the relevant facts must be the known facts at the time when the matter came before the Court. Upon the facts as now known, he submitted that there was no possible chance of condemnation of the goods in question, and that the Lords of the Admiralty could not show that "there was no reason to believe that the goods are entitled to be released."

He submitted that the right of angary was limited to the right to seize ships or, at any rate, vehicles of transport, and that it did not extend, as the Attorney-General suggested, to a general right of either belligerent to seize any goods or articles under the jurisdiction of either belligerent or on the high seas; also that it had now become obsolete. He said that there was no decided case in any Prize Court in England or America, or any other Court as far as he knew, in which there had been a decision as to the scope of the doctrine or in which the doctrine concerned had been referred to at all. He was proceeding to quote from the text books with regard to this doctrine when——

The PRESIDENT remarked that it was a very interesting subject, but he had not to decide about these rights on the present motion.

Mr. SCOTT : My original submission in the case was that the Rule speaks for itself, and is intended to be the code applicable to all cases coming within its terms; but the Attorney-General took a different view, and the relevance of this seems to me in effect to turn on the admissibility or the non-admissibility of the Attorney-General's contention. That is why I did not deal with it in my opening, and am dealing with it in my reply. It would be plainly disrespectful to the Court, after the intimation such as your Lordship has been good enough to give, to pursue the investigation of the source, continuance and scope of the doctrine to which the Attorney-General referred.

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Mr. SCOTT next contended that, assuming the Attorney-General's construction of the Rule to be correct, on the facts there was no case against the copper which would justify its condemnation.

The PRESIDENT: What evidence was before the Registrar as to its being neutral property?

Mr. SCOTT: It is a little hard to ask me that question as representing the parties who, I say, were wrongfully not brought before the Court.

The PRESIDENT: The proviso applies if the Judge considers there is no reason to believe it is neutral property. We must look at the bills of lading, I suppose.

Mr. SCOTT: I do not know for certain what documents were before the Registrar, but I think four were handed to your Lordship.

The PRESIDENT said there were two bills of lading dated October 21, 1914, and the manifest.

Mr. SCOTT said that from the documents one thing was certain, namely, that this was not enemy property and that it was bound to a neutral port.

The PRESIDENT remarked that the order for release was made on December 18. After the order it might be that the copper had been turned into munitions of war, and yet it was not for a considerable time that the applicants took any action. He did not know now whether it would be possible to give back copper which had, perhaps, been utilized.

Mr. SCOTT said that it might be physically impossible; but his clients had no reason to believe that such an order as this could have been made in regard to property which the Crown admitted was neutral.

The ATTORNEY-GENERAL replied that he made no admission about the property being neutral.

Mr. SCOTT said there was not a tittle of evidence in support of the allegation that this was enemy property in the endorsement on the writ. Therefore the only question which arose was that of contraband. When the copper was shipped and sold it was not on the list of absolute contraband.

The PRESIDENT : It was going to Gothenburg to be sold to all and sundry by Henry & Co.

Mr. SCOTT said he was not bound to assent to that proposition. That might be or it might not be so. In the Declaration of London the doctrine of continuous voyage was preserved.

### JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*) : The motion is made on behalf of a Swedish limited company, called the Svenska Company, to set aside an order which was made by the Registrar in these Prize proceedings on December 18 of last year, in respect of a quantity of copper—150 tons—which was part of the cargo laden on board the steamship *Antares*. The *Antares* was a Norwegian vessel. The copper was claimed as being at all material times the property of the Swedish Company. Therefore, the claim is that it was neutral property. The ship sailed from New York on Oct. 21. The copper was consigned by the shippers, the United Metals Selling Company, to C. S. Henry & Co., Ltd., as consignees, to be delivered at the port of Gothenburg, in Sweden. There are two bills of lading among the ship's papers which refer to the 150 tons. While the ship was still at sea, namely, on October 26, Messrs. C. S. Henry & Co., Ltd., who are

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the agents in this country of the shippers (who, as I am informed, are an American company), sold the 150 tons in question to the Swedish company, and the letters have been produced relating to that contract, and relating to the payment for the 150 tons. On September 21 copper was declared by this country to be conditional contraband, and on October 29 it was declared to be absolute contraband. The seizure took place at sea, I think Mr. Scott said, on November 12.

Mr. SCOTT : The 7th is the right date.

The PRESIDENT : You said the 12th—on November 7 or 12, but the ship arrived in Liverpool, with the cargo on board, of course, on November 14.

I have to decide in this case whether the Registrar was right in making the order which is now complained of. At the time the order was made the Swedish company had not entered an appearance. The time for entering appearance had not expired; they did, however, enter an appearance on the last day—December 22. I think that they ought to have made inquiries at the time as to whether anything had been done with the copper in the meantime, because it is quite clear that an application might have been made under Order XXIX. before an appearance was entered. However, they did not do so, and it was not until some date in February, 1915, that they ascertained that an order had been made; and I accept what Mr. Leslie Scott put forward on their behalf, that as soon as possible after ascertaining that an order had been made they took these steps to set aside the order. I want it to be perfectly clearly understood that I, to-day, am only construing, in reference to the facts in this case, Order XXIX. of the Prize Court Rules. I am not deciding anything with regard to the question of contraband, or to any other question which

may come up for decision when the Prize proceedings come to be heard. Then the facts will have to be fully gone into, and a decision given. Nor am I deciding anything to-day about the alleged right of the Crown, in certain circumstances, to seize property like this, if it should be necessary either for offence, or for the defence of the Realm. Those are matters which have been touched upon by Mr. Leslie Scott to-day, but as I intimated to him in the course of his argument I do not propose now to express any opinion upon any such matters. All that I have to do on this motion is to decide whether or not the order appealed from is a valid order, having regard to the provisions of Order XXIX.

There are two parts of Order XXIX. which have to be looked at in connection with this matter. The first is the provision in Rule 1 of the Order, which states :

If in a cause for the condemnation of a ship in respect of which no final decree has been made, it is made to appear to the Judge on behalf of the Crown that the Lords of the Admiralty desire to requisition the ship and that there is no reason to believe that the ship is entitled to be released, he shall order that the ship shall be appraised, and that upon payment into Court on behalf of the Crown of the appraised value of the ship the said ship shall forthwith be released and delivered to the Lords of the Admiralty.

The next is the proviso to Rule 1 :

Provided that no order shall be made by the Judge under this rule in respect of a ship which he considers there is good reason to believe to be neutral property.

Now in this case a requisition was made by the Lords of the Admiralty, and a release to the Lords of the Admiralty was ordered under Rule 3 of Order XXIX. which provides as follows :

Where in any case of requisition under this Order it is made to appear to the Judge on behalf of the Crown that the ship is required for the service of His Majesty forthwith,

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the Judge may order the same to be forthwith released and delivered to the Lords of the Admiralty without appraisement.

It was submitted, and, in my view, quite properly, by the Attorney-General, that the general provisions as to requisition in Rule 1 are applicable to the particular kind of requisition dealt with by Rule 3. I threw out a suggestion in the course of the argument that that might not be so; but I do not think, upon consideration, that my suggestion was well founded; and I agree with the submission that the Attorney-General has made.

The question, therefore, is whether or not, when the matter came before the Registrar *ex parte*—as sometimes these matters must come by reason of urgency—the provisions of the first Rule were satisfied. Mr. Leslie Scott says that it cannot be argued in this case that there was "no reason to believe that the ship" was entitled to be released. The Registrar cannot possibly go into all the facts of the case on an application of this kind; and looking at the case fairly, if he has good reason to think there is a substantial doubt as to whether the ship or goods are entitled to be released to the owners, it is enough to entitle him to make an order, on application of the Lords of the Admiralty for the delivery to the Admiralty. I repeat what I said in the course of the argument: I think that the Rule can quite fairly be read in this way—that such an order can be made where there is some reason to believe that the "ship" is not entitled to be released to the owners.

Now, in this case I have used the word "ship" because that is the word that occurs in the Order, but we are dealing here, of course, with cargo, and, as is well known, there is a provision in Rule 2 of Order I. of the Rules that

Unless the contrary intention appears, the provisions of these Rules relative to ships shall extend and apply, *mutatis*

*mutandis*, to goods and to freight (if any) due or to grow due; and for such purpose the term "ship" when used in these Rules shall also mean "goods" and "freight."

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Using the word "cargo" instead of "ship" I say that there was no such absence of any reason to believe that the cargo was entitled to be released when the matter came before the Registrar; on the contrary I think there was sufficient reason for the Registrar to believe that the cargo might not be entitled to be released, to entitle him to make the order if the first paragraph of Rule 1 stood by itself. The cargo of copper at this time was absolute contraband. It was going to Sweden, where at that time a great quantity of copper was being sent, as is well known, and it is open for proof when the time comes that this copper, although sent to be delivered at Gothenburg, might have Germany as its ultimate and real destination. It will be remembered that in the Note sent by the Foreign Secretary to America at the beginning of this year reference was made to the shipments of copper to the Scandinavian and other countries. Sweden itself is not mentioned separately, or apart from the other countries. It is taken with Norway, Denmark, and Switzerland, and this is what the Foreign Secretary says—it is common knowledge :

The figures taken from official returns for the export of copper from the United States for the months during which the war has been in progress up to the end of the first three weeks of December for Norway, Sweden, Denmark and Switzerland, under the description of "other Europe" (that is, Europe other than the United Kingdom, Russia, France, Belgium, Austria, Germany, Holland and Italy) are as follow :—

1913 :—7,217,000 lb.      1914 :—35,347,000 lb.

nearly five times the quantity.

I am not saying for a moment that it is the fact that the copper in this case, which was consigned to Sweden first, was intended for Germany afterwards. I am only



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considering what the Registrar had before him, and what he himself might have thought quite reasonably of the matter when the application was made. Of course, I say nothing against the conduct of the State of Sweden; everybody knows that it is a friendly State, and preserves its neutrality. And we know that at a later date, viz., December 5, there was a prohibition by the State of Sweden of the export from Sweden of certain copper, including copper of this description; and that the prohibition was strengthened by a subsequent one on February 2, 1915. But the temptation to make lucre among individuals may be as strong in Sweden as in other countries; and I say that the Registrar had a right to come to the conclusion which he did, that there was a substantial ground for investigating the question as to whether or not this cargo was entitled to be released to the claimants.

Now I come to the proviso to Rule 1. About this there is more difficulty in the Crown's way. The Crown cannot, I think, sustain this order of the Registrar unless they satisfy me that the contention of the Attorney-General is right, that "ship" in the proviso means ship alone, and does not include cargo. It must be that when the case came before the Registrar these goods were admitted to be neutral goods; and that it was as goods being contraband though neutral that the claim was made by the Crown that they were confiscable. The proviso reads:

Provided that no order shall be made by the Judge under this rule in respect of a ship which he considers there is good reason to believe to be neutral property.

The Attorney-General has failed to satisfy me—and I have been entirely unable to satisfy myself—that the word "ship" should be construed differently in the proviso from the word "ship" in the other parts of the Rule. "Ship" includes cargo under the first part of the Rule—

that is the hypothesis upon which this case has been argued, because if it does not include cargo, then, of course, there was no foundation for making this order at all. The term "neutral," so far as I have discovered, only occurs twice in the whole of these Rules. First, in Order II, Rule 23; and the second time, in this proviso to Order XXIX., Rule 1. The Attorney-General referred to the 23rd Rule of Order II., as being one of the parts of these Rules where it is pretty clear from the context that "ship" was not intended to include cargo. The Rule is :

Where a writ is issued in respect of a ship purporting to be neutral, notice of the institution of the cause shall be sent by the Registrar to the consular officer of the State to which the ship purports to belong.

It may very well be—I have not got to decide it—that in that Rule the word "ship" is to be confined to the vessel itself, and does not include the cargo. In various other parts of the Rules "ship," no doubt, is used in that sense; for instance, one Rule mentions the ship prosecuting her voyage,\* and in other of the Rules may be found various provisions with regard to the ship and provisions immediately following with regard to the cargo in the ship—as for instance, in Order XXVII., Rule 3.† If I am right in my view that the same construction is to be placed upon the word "ship" in the proviso to Rule 1 of Order XXIX. as in the rest of the Rule, namely, that it is to include cargo, then that proviso clearly shows that no requisition is to be made of any cargo which is admitted to be neutral property. I have no doubt, having given as careful attention to the matter as I can, that the intention of those who framed this Rule was to make it impossible, before the hearing of a condemnation suit, to take away the property of neutrals. At any rate, whether that was the

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\* Order XXX., Rule 2 (a).

[† See also Order XLII., Rule 2.—ED.]



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intention or not, I think it is clearly the effect of the Rule.

My decision is, therefore, that this being neutral property, being treated as neutral property when the matter came before the Registrar, and being in fact neutral property, as we know it to be now, the proviso to Rule 1 makes it impossible for the Crown to requisition this cargo under the provisions of Order XXIX. I repeat what I said at the beginning, that I am only dealing with this matter under Order XXIX., because whatever other rights the Crown may have or may be said to have, what they did in this case was to invoke the help of Order XXIX., Rule 3, to obtain an order for requisition. The order, therefore, must be set aside.

Mr. SCOTT : With costs ?

The PRESIDENT : No costs against the Crown, I think.

The ATTORNEY-GENERAL : We never get them against the subject.

The PRESIDENT : The only order I have made up to now is that the order of the Registrar must be set aside. There are other parts of your notice of motion you say, Mr. Scott ?

Mr. SCOTT : Yes, my Lord. The rest in my view is consequential ; it is that the property should be restored to where it was when the order was made. I daresay it is enough for the order to be set aside—I think that follows as a necessary consequence.

The PRESIDENT : I do not think it does. That is why I pointed out that you had not taken the steps that you might have taken earlier. The property has been removed—some part of it is at Woolwich and some part of it at Hull. All I think you are entitled to is, that in so far

as the property has not been used up to now it ought to be regarded as being in the custody of the Marshal, and instead of removing it from one place to another and so involving expense I have no doubt that the Crown will undertake that they will keep that property there as if it was in the custody of the Marshal.

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Mr. SCOTT : That is all I ask.

The ATTORNEY-GENERAL : I cannot agree to have it put in that form, because it may be that by this time some of that property may be actually incorporated into war material.

The PRESIDENT : I am not going to touch that, but as much of the copper as is in the condition in which it was when requisitioned must remain, I think, *qua* these proceedings in that condition. I do not want the Crown to have to incur the expense of bringing it up.

Mr. SCOTT : I do not ask for that. So long as it is in the custody of the Marshal it can stay where it is.

The PRESIDENT : Yes.

Mr. SCOTT : I think we ought to be informed how much has been used and how much is left.

The PRESIDENT : Yes.

The ATTORNEY-GENERAL : I should not oppose that when I know what it means ; I am not quite certain about it.

It wants considering whether the other cases are, from every point of view, the same. Of course, we have to begin with one, but it is not the case as regards all the others, at any rate, that the ship was brought in. One is the case of a ship which was calling at Hull, and I think that the copper was being transhipped, and that it was requisitioned while it was being transhipped. I cannot say where, but I should conceive that it was on the quay.



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Mr. SCOTT: I can tell your Lordship, if the learned Attorney-General will follow, what the facts are. There is one other shipment on the *Norheim* belonging to the *Svenska*, and there is one belonging to —

The PRESIDENT: Is that Norwegian?

Mr. SCOTT: That was Norwegian; it was taken in the open sea and brought in. That is on the same footing as in this case. In addition, there are shipments by the Finspongs Company, brought by the Wilson Line from the United States on through bills of lading to ports in Norway, to come through to Sweden. Those vessels which brought the copper from America finished their voyage at the port of Hull, which was, under the through bill of lading, the port of transshipment.

The PRESIDENT: Yes, and all the ports of discharge were in Sweden, you say?

Mr. SCOTT: In Norway. But there was a declaration of a neutral ownership, which seems to be the only relevant point in your Lordship's view.

The ATTORNEY-GENERAL: I have not looked at this part of the case closely myself, but my learned friend Mr. Ricketts, who is with me, tells me that he satisfied himself, when the document was produced, that the title to the copper was neutral in every one of these cases, and, therefore, so far as the decision depends on the fact that the property is neutral—so far, I think, there is no distinction between the cases.

The PRESIDENT: What about the summonses which were adjourned into Court?

Mr. SCOTT: Those were summonses taken out for the purpose of enabling the neutral to know what charge of contraband was made.

The PRESIDENT : What has happened to them ?

Mr. SCOTT : I will just mention them and they may be disposed of. They were taken out for the purpose of obtaining an order from your Lordship that particulars of the claim of the Crown should be given, indicating what was the ground for suggesting that the consignments were bound to a contraband destination, and for an order that the hearing of the causes should be made. I am told that the summons is limited to that one point.

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The PRESIDENT : And it asks for particulars.

Mr. SCOTT : There is an application for a petition. All I want is a statement of the grounds upon which it is alleged that the goods were contraband—that is to say, had a contraband destination—entitling the Crown to condemnation—nothing else.

The PRESIDENT : Well, I am afraid I cannot give it to you.

Mr. SCOTT : Then that disposes of it.

The PRESIDENT : This is an application by persons against whom Prize proceedings have been taken as the owners of the cargo, asking that proceedings should be taken by pleadings, by petition, and by an answer, and so forth, and asking that particulars of various matters should be given by the captors or by the Crown. It has been pointed out over and over again that the procedure in Prize Courts is, and is properly, very different from the procedure in the municipal Courts. I am not going to be any party, except in extremely special cases, to the introduction of pleadings, summonses for particulars, and so forth, into these Prize Court proceedings. It is the theory and practice of the Prize Courts, and I think it is a very sound one, that the Crown captures or seizes a vessel



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and the Procurator-General takes proceedings for condemnation; and the persons who allege that their property is seized must take steps in those proceedings to claim the property and to establish that it belongs to them, and that it is not confiscable. It is enough for the Crown to say, "We regard this vessel or this cargo as prize. We seize it as prize, and we issue a writ against you in which we tell you that we are going to ask the Court for its condemnation as prize." Thereupon the claimants must file their claim and produce their evidence; and it is for them to show that the seizure and capture by the Crown were not rightfully made. If they do not show that, their claim fails. The Crown then must satisfy the Court that the ship or property is good prize, and subject to condemnation.

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#### COUNSEL

For the Crown	...	...	<i>The Attorney-General.</i> <i>G. W. Ricketts.</i>
For the Claimants	..	...	<i>Leslie Scott, K.C., M.P.</i> <i>R. H. Balloch.</i>

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#### SOLICITORS

For the Crown	...	...	<i>The Treasury Solicitor</i> <i>for the Procurator-General.</i>
For the Claimants	...	...	<i>Kearsey, Hawes &amp; Wilkinson.</i>

German Sailing Ship  
**"ROLAND."** 1377 Tons.  
 (Cargo *Ex.*)  
 (E. DIERCKS, *Master.*)

Owners: D. H. Wätjen & Co., Bremen.

This case is also reported

**84 L. J.** (P.) 127.

**31 T. L. R.** 357.

**1 Trehern,** 188.

*German Vessel—Cargo consigned from Neutral Country to Germany—Presumption of Enemy Ownership—Neutral and Enemy Citizens jointly interested in Cargo—Condemnation of Enemy's Interest—Release of Neutrals' Interest—Captors' Claim for Freight against Neutrals—Prize Court Rules, Order XLIV., Rule 2—Admission of Appeal—Warehouse Charges when Cargo released to Claimants.*

Goods on an enemy ship, consigned to an enemy country, are *prima facie* enemy property, and neutral claimants must make out their case clearly.

When a ship is condemned, the captors are not entitled to any freight in respect of cargo which is released, unless they bring the cargo to its destination; and it is immaterial that by the law of the country to which the ship belongs the shipowners would have been entitled to some freight.

In this case the Court had, on December 1, 1914, condemned the German sailing ship *Roland*, which had sailed from New Orleans for Bremen with a cargo of oak staves and tobacco. The Crown now asked for the condemnation of the cargo, and there was a claim by Messrs. Wessels, Kulenkampff & Co. for 342 hogsheads of tobacco in the

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—  
Before the  
Right Hon.  
Sir Samuel  
Evans,  
President of  
the Probate,  
Divorce, and  
Admiralty  
Division.



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cargo, and another claim by Messrs. Rudolf, Hach & Co. and Suhling & Co. for 50 hogsheads of tobacco.

Mr. MAURICE HILL, K.C. (for the Crown), said that the ship sailed from New Orleans on July 1 or 2. On August 5 she was captured by a British cruiser at sea and taken to St. Mary's Roads, Scilly Islands, and from there was towed into Plymouth. The cargo was bound for Bremen, and, the ship being German, there was a presumption that the cargo was also enemy property. It included 13,783 ft. of oak staves, in respect of which item there was no claim, and he asked for its condemnation. The next item was 299 hogsheads of tobacco, which were included in the claim. Then there were 50 hogsheads of tobacco shipped by C. A. Bautz to Bremen. Seven of those had been released to Mr. Obel, a Dutch merchant, leaving 43 for condemnation. Then came an item of 100 hogsheads of tobacco, in respect of which no claim was made, for which condemnation was asked. The next item was 315 hogsheads of tobacco, of which 54 had been released to Mr. Obel, leaving 261 to be condemned. In like manner there was another item of 35 hogsheads of tobacco in respect of which there was no claim. It came from New Orleans, and was tobacco that was consumed in Germany. Then there was an item of 50 hogsheads of tobacco, which was claimed by Rudolf, Hach & Co., and the firm of Suhling & Co. There were also 50 hogsheads of tobacco shipped by Richard Meyer & Co., and 275 hogsheads of tobacco shipped by Wätjen, Toel & Co., and he asked for their condemnation. The items in dispute were the 50 hogsheads claimed by Rudolf, Hach & Co. and 342 hogsheads claimed by Wessels & Co. A question would possibly arise if his Lordship were to release these goods, whether the Crown could take the place of the shipowners and claim the freight in respect of the carriage of the goods.

The 50 hogsheads were purchased by Rudolf, Hach & Co. in Tennessee, and were to be sold on the German market by C. H. Suhling, of Bremen, a German subject, under a standing arrangement which had subsisted for many years between Rudolf, Hach & Co. and C. H. Suhling and the other claimants, Suhling & Co., of Virginia, whereby the profits or loss were to be shared by the three parties in these proportions:—Rudolf, Hach & Co., one-half; C. H. Suhling and Suhling & Co. a quarter each.

Before investigating these claims he would quote authorities to show that goods found, as in this case, on an enemy ship were presumed to belong to the enemy unless they could be shown to be neutral property, and that any affidavit on that point must be corroborated. The Court would not accept the statement of the claimant alone. He cited :

The *Magnus* (1798), 1 Ch. Rob. 31.

The *Rosalie and Betty* (1800), 2 Ch. Rob. 343; 1 E.P.C. 246.

The *Jenny* (1866), 5 Wallace 183.

Story's *Notes on the Principles and Practice of Prize Courts* (Pratt's ed.), p. 55.

The Declaration of London, Art. 59.

If the documents satisfied his Lordship, continued Mr. HILL, that there was, as stated, a consignment for sale on account of a joint adventure to Bremen, then the property was at the time of the seizure in the joint adventurers.

The claim now put forward was that, although it was intended as between the three parties to be a joint adventure, inasmuch as C. H. Suhling, of Bremen, had not paid his proportion of the purchase price he had ceased to be a partner in the joint adventure. That, he submitted, was wrong, because Rudolf, Hach & Co. bought on behalf of all three, and the property in the goods was, therefore, vested in them jointly, just in the same way as C. H. Suhling, of

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Bremen, would be selling for joint account and would be liable to the others for their shares.

Mr. D. C. LECK, K.C. (for Messrs. Rudolf, Hach & Co.), said, in reply to the President, that the bills of lading were sent on to C. H. Suhling, in Bremen, but through the American Consul they were returned to the representatives of the claimants in London. They were then forwarded to the Procurator-General.

Mr. HILL submitted that if his Lordship was satisfied that the case was one in which there was a purchase on joint account for a sale on joint account, then he would no doubt release the shares of the neutral parties and condemn the share of the enemy party. It was only a question as to whether he (Counsel) was right in saying that this was a purchase on joint account, in which the ownership was throughout in C. H. Suhling jointly with the claimants, or whether the property in the goods remained in Rudolf, Hach & Co. to be transferred by them at some later time when Suhling & Co., of America, and C. H. Suhling, of Bremen, paid their contributions to the purchase price. He submitted that every document was contrary to the view that this was otherwise than a purchase on joint account.

The PRESIDENT: Do you ask for condemnation of the one-fourth share of C. H. Suhling, of Bremen?

Mr. HILL: Yes, my Lord.

Mr. Hill then called Dr. E. J. SCHUSTER, a member of the English Bar and Doctor of Law of Munich, who said that he had spent a good deal of his time in this country in advising on German law.

Mr. HILL: What is the right of a German shipowner to freight in these circumstances—where he has shipped cargo under contract for a particular destination, but the voyage

is broken up short of that destination? Does he become entitled to freight or no freight or *pro rata* freight?

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WITNESS : If the voyage is broken up by one of the accidental events which are mentioned in Section 628 of the German Commercial Code, the shipowner is entitled to distance freight; and one of the events mentioned in that table of events is capture and condemnation as lawful prize.

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Mr. HILL : If a German ship is sailing from New Orleans to Bremen as her destination, and she is captured by the British Crown and is condemned, then if the German shipowner could sue for freight at all he would be entitled to *pro rata* freight for the distance the goods were carried ?

WITNESS : Yes.

The PRESIDENT : Determined by time or distance ?

WITNESS : By distance, time, and all other circumstances.

Mr. LECK (cross-examining) : Do you say the German code provides what is to be done about freight in the event of seizure and capture ?

WITNESS : The provision is quite general.

Mr. LECK : Do you say that the German shipowner is entitled to freight, no matter who captures the ship ?

WITNESS : As between the shipowner and the owner of the goods, the shipowner is entitled to freight. There may be a question as to the freight itself being the subject of capture; that is another point.

Mr. LECK : If the goods were subject to capture, and by capture of the goods the shipowner would be deprived of



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the freight he might otherwise claim, then it might be said he was entitled to *pro rata* freight ?

WITNESS : If the goods are lost, no freight ; but if part of the goods is saved for the benefit of the cargo owner, then the distance freight must be paid, but the freight must not exceed the value of the goods saved.

The PRESIDENT : Take the particular facts in this case. A German ship sailing from New Orleans with cargo destined for Bremen, but stopped by reason of capture of the German ship at Plymouth, and the cargo released to neutrals at Plymouth—in such a case, according to German law, what freight, if any, would the shipowner be entitled to ?

WITNESS : He would be entitled to a proportionate part of the freight on the goods in accordance with Section 631 of the German Commercial Code.

Mr. C. ROBERTSON DUNLOP (for Messrs. Wessels, Kulenkampff & Co.) cross-examining : Do you know of any case in German law in which freight has been payable to the belligerent captor of a German ship as distinguished from freight payable by the captor of the cargo ?

WITNESS : The shipowner is entitled to retain the goods until the freight payable to him has been paid.

The PRESIDENT : And on the capture of the ship the captor takes the place of the shipowner ?

WITNESS : That would seem to be the logical conclusion.

WITNESS added that when he spoke of " shipowner " he used that word for brevity's sake. What he meant was the person or persons entitled to freight under the contract of affreightment.

Mr. HILL then read an affidavit by Mr. Johannes Suhling, of America, which stated that he and his brother,

W. G. Suhling, were American citizens. They owned one-fourth interest in the 50 hogsheads of tobacco. There was also correspondence, which showed that there were many other joint transactions between Suhling, of America, and Suhling, of Bremen, the latter acting as agent for sale on commission for Suhling, of America, and from time to time stating that he was crediting their account with their one-fourth interest.

He submitted that the goods were purchased on joint account, and remained in the joint adventure, and, therefore, he asked his Lordship to condemn the share of Christopher Suhling. He did not ask him to condemn the other shares, because they had the evidence which the Prize law required, viz., not only the asseveration of the party claiming, but also contemporary documents showing that it was correct.

The Crown also claimed the freight, and he submitted that as the owner of the ship could have sued Rudolf, Hach & Co. and the others, either in America or Germany, for the freight, the question was, what did the Crown capture? They captured whatever the right of the ship-owner was, i.e., the right to freight. Such a right became on capture a vested right, and that was part of what was captured. On this point he cited :

The *Prosper* (1809), Edw. 72; 2 E.P.C. 25.

*Paradine v. Jane* (1647) Aleyn, 26; Style, 47; 82 E.R. 897.

The *Fortuna* (1802), 4 Ch. Rob. 278; 1 E.P.C. 392.

The *Diana* (1803), 5 Ch. Rob. 67; 1 E.P.C. 424.

The *Vrouw Henrietta* (1803), 5 Ch. Rob. 75, note; 1 E.P.C. 427, note.

Mr. D. C. LECK, K.C. (for Rudolf, Hach & Co.), said that whether the Crown was right in asking that the one-fourth ought to be condemned must depend on whether

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the property to that extent had passed to Suhling, of Bremen. His position was that of an agent for sale on the terms that he had to pay one-fourth of the value of the goods sent for sale, and that he was entitled to one-fourth of the profit or liable for one-fourth of the loss, as the case might be. There was nothing to show that the property had passed to Suhling, of Bremen, and the true inference of law was that until the goods reached him they did not come under the joint adventure agreement, and no right of property in any part of the goods passed to him until the goods had been delivered to him at Bremen under the bill of lading. It was true that an invoice was sent to him for the purpose of showing the value of the goods, but it was not an invoice such as would be sent by a vendor to a purchaser. It was merely a record for the purpose of this joint transaction, and a statement of the price at which the goods were to be taken.

The PRESIDENT : It is not contended that the goods were sold by the people in America to the purchasers in Germany. What the Crown put against you is that immediately they are bought in America they are your property. They say that the people who buy in America buy for A, B and C, and that C in Bremen is entitled to one-fourth.

Mr. LECK said that no property would pass till the goods reached Bremen. There was nothing to show that the goods would in any way become Suhling's property so that he could be treated as interested in them until they arrived at Bremen. He submitted that the whole of the goods ought to be released to Rudolf, Hach & Co.

On the question of freight the practice of the Court had been that where goods were not carried to their destination, the vessel being condemned and the goods being released, the captors were not entitled to freight.

The PRESIDENT : What Mr. Hill says is that when the offending ship is captured, she is captured with the freight to which she is entitled, and that the captors are entitled to that freight.

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Mr. LECK said that it was a novel suggestion ; it was asking his Lordship to do what he had refused to do in cases not of freight, but of other questions, viz., taking into account the effect of foreign law. He contended that the captor of the goods could not take the place of the ship-owner in claiming freight, unless there had been an actual carriage to the port of destination. Foreign law on this point was irrelevant to the issue which the Court had to decide.

Mr. DUNLOP, on the same point, cited the *Vrow Anna Catharina*,\* which he said decided that the captor is

. . . only entitled to freight if he brings the cargo to the port of destination.

Lord Stowell, giving judgment in the case, said :

The general rule is well known, being founded on very ancient principles of law, that whenever the captor brings the goods to the port of actual destination, he shall be entitled to the freight, on the ground that the contract has been fulfilled ; but that in all other cases freight shall not be due, although the ship may have performed a very large part of her intended voyage, and so large a portion, as to raise at first sight an appearance of hardship and injustice in the refusal of freight, and to suggest a doubt whether it might not be a better rule to allow a proportion of freight *pro rata itineris peracti*. But I am very certain that such a rule, if fully considered, would be found to be productive of much practical injustice, and would lead to endless litigation, and uncertainty, in the discussion of the particular circumstances that would be relied on in every case. The ancient rule of practice, therefore, is one which the Court may be allowed to adhere to with much rational bigotry.

\* (1806). 6 Ch. Rob. 269 ; 1 E.P.C. 552.



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The PRESIDENT : That is a very picturesque phrase.

Mr. HILL (in reply) contended that they had to apply a different law merchant from what prevailed in Lord Stowell's time. The question here was what was the ship-owners' lien. In the case of a German ship, the law on that point could be clearly ascertained. If these goods were the joint property of three persons, one of whom was an enemy, the whole of the goods were enemy property. The Court would be making an exception to the proper result of the property being enemy property if it recognized the right of a non-enemy person in the goods, and in the freight which was really freight due on goods that in strict law were enemy goods.

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Mr. HILL, with regard to Messrs. Wessels, Kulenkampff & Co.'s claim, proposed to adduce as evidence an extract from a despatch from the Governor of Jamaica, setting out a cutting from the *New York Journal of Commerce*. He was not in a position to put in the whole despatch, but he had tendered the relevant part of it to Mr. Dunlop. There was, however, no objection to his Lordship seeing the whole despatch.

Mr. DUNLOP contended that evidence of this kind ought not to be tendered at this stage of the case. His clients submitted to the Procurator-General a long time ago all the evidence they had. This extract from a New York paper had no bearing on the question in whom the property was vested at the date of the seizure; it was merely information.

The PRESIDENT : I do not think that I ought to admit this information as evidence. So far as I can see, the Governor does not vouch for its accuracy.

Mr. HILL, continuing, said that there was no corroborative evidence of the statement that the goods were con-

signed for sale. If it were true, then there must have been abundant corroborative documentary evidence in existence, yet the only document that was forthcoming was what purported to be an invoice. But it was not a contemporary document, being dated September 2, two months after the vessel sailed.

He asked the Court not to accept that invoice as evidence, nor the bills of lading as the originals. One of them was not endorsed, and it was inconceivable that business men would send bills of lading for valuable property across the ocean unendorsed. The claimants had not proved that the property in the cargo was in them as neutrals, and they had not displaced the presumption that the property on the enemy ship was enemy property.

Mr. DUNLOP said that the question was now raised in the Prize Court for the first time since the outbreak of the war, what amount of evidence the Court required claimants to adduce in support of their claim. The new Rules afforded no assistance, and his Lordship had not had an opportunity of laying down any rule which would be a guidance to those who practised there, and to lawyers in America who had to frame affidavits of the kind which had been put before the Court in this case.

Mr. Hill's argument started with the presumption that there was a rule in the Prize Court that goods on board an enemy ship were *prima facie* enemy property. He disputed that there was any such rule. Certainly there was no such rule in regard to goods shipped before the war by neutral shippers at a neutral port, and he submitted that there was no such presumption in fact.

The question was: In whom was the legal property at the time of capture? and that question was absolutely independent of the nationality of the ship. He invited his Lordship to rule in this case that there was no such

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presumption, and that the alleged rule in law did not exist.

It was immaterial to the merchant shipper in times of peace what the nationality of the ship was, and that was particularly true of America, because the ocean trade of that country was not carried on in American vessels, but principally in British, Norwegian and German ships. Therefore there would be no *prima-facie* presumption with regard to shipments from America that the goods on board a ship belonged to the same nationality as the ship.

He had gone through the cases to see whether such a rule was part of the Rules of the English Prize Court, and he failed to find that it was. There was only the general proposition that the onus of proof lay upon the claimants; but it made no difference to the amount of proof required by claimants whether the goods were on board a German or a British ship. In ancient days there was such a presumption, because the goods, as a rule, belonged to the shipowners. Article 59 of the Declaration of London provided that :

In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods.

The commentary upon the Article was as follows :

Article 59 gives expression to the traditional rule according to which goods found on board an enemy vessel are, failing proof to the contrary, presumed to be enemy goods; this is merely a simple presumption, which leaves to the claimant the right, but at the same time the onus, of proving his title.\*

Article 59 was only intelligible if read as referring to shipments made after the outbreak of war, and it was not intended that there should be such a presumption in

\* See *Manual of Emergency Legislation*, page 505.

the case of goods shipped in the time of peace. Upon these grounds he submitted there was no rule of evidence by which that Court was bound to draw the inference, which was contrary to common-sense, that because the goods were shipped on a German ship they were *prima facie* enemy property. Apart from that point, he submitted that whatever degree of proof was required from a claimant had been satisfied in the present case.

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The PRESIDENT said that in the olden days it had to be set out positively and distinctly that no enemy had any right or interest in the cargo. He thought that Mr. Dunlop would look in vain in his affidavit for any such statement.

Mr. DUNLOP said he would deal with the allegation in the affidavits later, but he wanted to deal first with the nature of the evidence which early Prize Courts required. When questions came before Prize Courts they were determined only on the evidence obtained from the ship's papers, and in the answers to the standing interrogatories and the affidavit of the claimant filed in support of his claim. If the case was left in doubt the Court would then, on the application of the claimant, order further proof.

The PRESIDENT: That requires serious qualification.

Mr. DUNLOP said the Court would, subject to certain exceptions, not allow further proof to be given if the ship's papers were false, or if the evidence which the claimant was asking for leave to get was in direct conflict with the answers to the interrogatories or the evidence shown in the ship's papers. The amount of proof required would depend entirely on the degree of doubt in each case. In cases of grave suspicion or difficulty the Court might order what might be called plea and proof—pleadings and very strict proof. These were declared by one authority to be "very solemn proceedings" and "rarely resorted



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to." In the practice of the Prize Courts before the present Rules, affidavits such as were presented in this case would have been more than sufficient. The bills of lading which the Court had before it for the 299 hogsheads were three in number, and were exhibited to the affidavit of the claimant. One was signed with the master's initials, and was marked "Copy." It came from New York.

The PRESIDENT: Does a master sign a "copy" of a bill of lading?

Mr. DUNLOP: Yes. There are the original, a duplicate and a triplicate.

The PRESIDENT said the question was whether the exhibits stamped "original" were actually the originals, or whether they had been obtained since. It was not usual for a "copy" to be signed or initialled by the master, and if the copy was made afterwards it showed that those who made it had access to the person who signed these three documents.

Mr. DUNLOP said the crews had been interned on arrival in this country.

Mr. MAURICE HILL: If the master was interned my friend knows perfectly well that access to him could be readily obtained.

Mr. DUNLOP: If opportunity of access could be obtained for the purpose of getting such signature, it would be a most clumsy fraud if intended as such. If such a fraud were contemplated you would expect the master would be asked to sign an original. The duplicate before the Court is signed by the master in full. There is no ground for the suggestion that these were not the bills of lading, but forgeries.

The PRESIDENT : Why were they not endorsed ? The fact that they were not endorsed is explained by saying it was an omission.

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Mr. DUNLOP said the fact that they were not endorsed favoured the claimants.

The PRESIDENT : Who could take delivery of the goods at Bremen if the bills of lading were not endorsed ?

Mr. DUNLOP : The agent of Messrs. Suhling & Co., who was in the ordinary course to deliver the goods to somebody.

The PRESIDENT (*to Mr. Maurice Hill*) : What do you say to that ?

Mr. MAURICE HILL : I say he would be doing a most hazardous thing. You cannot deliver goods to a person rightly entitled to them unless he produces the bills of lading.

The PRESIDENT : Not if a man says, " I have a bill of lading unendorsed " ?

Mr. HILL : It might be absolutely fatal to deliver them, for someone might come along with a bill of lading endorsed.

Mr. DUNLOP disputed that proposition. The master was bound to deliver goods to a person who came forward with the original bill of lading, but not, of course, only on the production of a " copy." The second bill of lading in this case was marked " original," and signed by the master in full. There were, therefore, these three bills of lading—the original, a duplicate, and what was called a " copy," merely initialled by the master, all relating to the 299 hogsheads. As to the 43 hogsheads, the position was stronger, because the three bills of lading were all signed by the master in full.



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The PRESIDENT: Where did the triplicate come from ?

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Mr. DUNLOP said New York. There was no ground for saying that these bills of lading were a fraud or a forgery. His Lordship had had an opportunity of seeing the handwriting, and was better able to judge, but there was no evidence, and it was a very serious suggestion to make, and one which it was difficult for Counsel to meet at the eleventh hour, when his clients were in America and the master in Germany.

He asked the Court to say that these goods were the property of the shippers at the time of shipment and remained so. That was shown by the bills of lading themselves. The only way in which the property could have passed to a German consignee was if the American people had made a consignment of the goods by which they would have passed to a buyer in Germany. In addition to the bills of lading, his Lordship had the invoice. True, there was no invoice made on the date of shipment; but this was a sailing ship, and there was no object in sending an invoice on the day when the goods were shipped, because it would have arrived in Bremen long before the goods. As a matter of fact, it came over with the first affidavits in October. It showed that Messrs. Wessels, Kulenkampff & Co. had bought the various parcels comprising the shipment in New Orleans, and had paid for them by bills on New York, and appeared to be the proper proprietors of this tobacco. That document, so far as it went, assisted the claimants, and the affidavits said in terms expressly that these goods were consigned to Bremen to be sold. The German agent had no interest in the goods himself, and was to render an account of them after they were sold. This was a case in which under the old law the Court would have released the goods without further proof, acting upon the ship's papers and the affidavits of the claimants.

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A point was made by Counsel for the Crown that there should be documents in existence which would corroborate and support the statement in the affidavits. But that point was not open to the Crown now, because, as soon as these affidavits arrived in this country, they were sent by the claimants' solicitors to the Procurator-General. The Crown could have asked for other documents. They said that they were not satisfied and that there was a suspicion of fraud. They had the documents since October, and all they did was to ask on the 17th inst. for the invoice, the bills of lading, and the correspondence in the matter. Those had been produced.

The PRESIDENT: You seem to suggest that it is incumbent upon them to specify every single document they want you to produce. That is not necessary at all.

Mr. DUNLOP: My contention is that from the first they have not asked us to produce anything we have not produced, and the Crown ought not to be allowed at this stage to make the suggestions they have made.

In conclusion, Mr. DUNLOP asked for judgment for his clients, or, in the alternative, that they should be asked for further proof if his Lordship thought that the affidavits ought to be supplemented by further evidence. He submitted, however, that they were quite sufficient as they stood.

The only other question was whether, if the facts stated in the affidavits were true, these were enemy goods or neutral goods. If these facts were true, it could not be contended that these goods were enemy goods. The property remained in the shippers because the goods never arrived at their destination, and there was abundant authority for the view that where the goods were consigned for sale they remained the property of the consignor.



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Mr. HILL (in reply) said that he was not concerned to chop words as to whether there was a presumption that goods on an enemy ship were enemy goods, or whether the onus was on the claimants to prove they were not. Both propositions were in substance identically the same. He submitted that Article 59 of the Declaration of London\* had in mind not only shipments after war, but before war.

The PRESIDENT : In the same chapter Article 60 says :

Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they regain their neutral character.

Mr. HILL : Yes ; and Article 43 says :

If a vessel is encountered at sea while unaware of the outbreak of hostilities, &c.

The same Article also lays down a presumption as to knowledge of the outbreak of hostilities which would be quite unnecessary if shipment before war was not contemplated.

It was also said by his friend that for some reason or other it was not open to the Crown to put the claimants to the proof which the Court required, because they had not previously told the claimants that the proof which they (the claimants) were offering was not a sufficient discharge of the onus. He, however, had yet to learn that it was part of the duty of the Procurator-General to advise claimants upon evidence. At first he was inclined to take a charitable view of the action of the claimants in putting forward the invoice of September 2 ; but since it was now put forward as a genuine invoice he submitted there never

\* For the text of the Declaration see *Manual of Emergency Legislation*, pages 449-463.

was a clearer case of a bogus document. As to further proof, his contention was that every single document which had been put forward in support of the claim was not a genuine document, but was put forward to cloak something. The claimants should not be allowed further proof. The Court would never allow further proof where there had been an attempt to mislead or deceive.

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### JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*) : The Crown in these proceedings asks for the condemnation of certain portions of the cargo laden on board the sailing ship *Roland*, a German ship, which was condemned by me as Prize on December 1, 1914. There are various lots of cargo about which there is no dispute. There are two other lots about which there has been a dispute and a great deal of argument. I will deal first of all with the portions of the cargo in respect of which no claims have been put in, and which are clearly enemy property, and of which, therefore, I will decree condemnation.

First, there are certain pieces of oak staves shipped by F. C. Mundhenke to his own order as consignee, consisting of 28,058 in one lot and 13,783 in another lot. They will be condemned. There is a portion of the cargo which consists of 50 hogsheads of tobacco shipped by C. A. Bautz and consigned to order. Of these 50 only seven have been released, and the remaining 43 are condemned. Another portion of the cargo, consisting of 100 hogsheads of tobacco shipped by A. W. Gruener & Sons, and consigned to order, is condemned likewise. There are various lots of tobacco, amounting in all to 315 hogsheads. Of these, 54 hogsheads have been released, and the remaining 261 are condemned as enemy property. The portion with which I have just dealt was shipped by Hoffmann & Leisewitz to their order



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as consignees. There is another portion of the cargo, consisting of 35 hogsheads of tobacco, shipped by the same firm of Hoffmann & Leisewitz and consigned to order, which is also condemned. There are 50 hogsheads of tobacco shipped by Richard Meyer & Co. to their own order as consignees and marked "H (W) C. 1/50," in respect of which there is no claim, and they are condemned too. (There is another portion of 50 hogsheads of tobacco, shipped by the same firm, the subject matter of the claim which has been argued by Mr. Leck.) There is one hogshead of tobacco shipped by De Erwen, De Wed. J. Van Nelle, to their own order as consignees, and that is condemned. Another portion of the cargo, amounting to 275 hogsheads of tobacco, shipped by Wätjen, Toel & Co. to their own order as consignees, is condemned too. Finally, 18 hogsheads of tobacco, also shipped by Wätjen, Toel & Co. to their own order as consignees, are condemned. That disposes of the unclaimed portions of the cargo.

There are claims to two other parcels of cargo with which I have to deal. First, Messrs. Wessels, Kulenkampff & Co. claim to be entitled to 342 hogsheads of tobacco; their claim has been argued by Mr. Dunlop. There remains the claim of Messrs. Rudolf, Hach & Co. to 50 hogsheads of tobacco shipped by Richard Meyer & Co., to which I have referred, supported by Mr. Leck.

I will deal first of all with the claim of Messrs. Wessels, Kulenkampff & Co. Messrs. Wessels, Kulenkampff & Co. are a firm whose commercial domicile is the United States of America, and who carry on part of their business at Jamaica and Trinidad. The firm is composed of a gentleman of the name of Lewis Wessels, who is a British subject residing at Kingston, in Jamaica, and apparently takes charge of the part of the business which is transacted there. The other members of the firm are Alexander von Gontard, Johann Smidt, and Gustav Kulenkampff. They all reside

in New York, and have resided there for many years. Their business domicile—trading under the name of Wessels, Kulenkampff & Co.—is New York, but they are all three German subjects. They claim the 342 hogsheads of tobacco as their property as neutrals. The Crown seized this property as being enemy property to which they claim to be entitled as prize.

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I think it is abundantly clear that according to prize law property upon an enemy ship, consigned to an enemy port, is *prima facie* enemy property; and it is for the claimants, who allege that the property belongs to them as neutrals, to make out their case and to make it out clearly. No authority, I think, is required for that proposition. Several cases have been referred to in the course of the argument, but I am content to say that such is, and ought to be, the presumption in cases of this description.

The question, therefore, to which I have to address myself is whether the evidence which has been put before the Court by the claimants, Messrs. Wessels, Kulenkampff & Co., is sufficient to establish that the property in the goods was in them. The goods were put on board this German vessel before the war. She sailed in the early days of July; was captured at sea on August 5; and, as I have already said, was condemned on December 1 as an enemy vessel. The appearance of Messrs. Wessels, Kulenkampff & Co. was entered on September 7. More than six months have elapsed; and abundant opportunity has been given to these gentlemen, who carry on their business in New York, to put before the Court a complete case to try and establish their ownership in these goods. Several affidavits have been made on their behalf from time to time. The first affidavit was made by Mr. Gustav Kulenkampff on October 13, 1914, the second on November 27, 1914, and the third on December 22, 1914. Affidavits have also been filed



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which were made by Mr. John Furniss, the solicitor acting for the claimants in this country, a member of the firm of Hill, Dickinson & Co., one sworn on December 2, 1914, and the other sworn on December 15, 1914. Putting it broadly, the case set up by these affidavits is that this property belonged to this firm, whose commercial domicile is in New York, and that it was sent forward to some agents in Bremen for the purpose of sale, and that the property remained in the shippers and had not become transferred to consignees, or agents, or to anybody else in the enemy country. The bills of lading, according to the copies which have been put before me—whether they are genuine or not I will deal with in a moment—show that the tobacco was consigned to the order of the shippers. The first affidavit of Mr. Gustav Kulenkampff describes the firm of Gebrüder Kulenkampff, of Bremen, as the consignees of the property.

Nothing could have been simpler than for the claimants to have brought forward the whole evidence of the transactions relating to this shipment, and possibly to shipments of a similar kind consigned to their agents for sale in Bremen. If the bills of lading were sent forward to Bremen, as they say they were, nothing would have been easier than for the business firm in New York to have exhibited the correspondence between them and their alleged agents in Bremen. In my opinion, those original letters, or the business copies of such letters—if there were such original letters or copies—ought to have been produced. They also ought to have exhibited letters from the firm in Bremen—whom they describe sometimes as their agents, sometimes as their consignees—acknowledging the receipt of the bills of lading, and informing the business house in New York of what had been done in relation to the bills of lading upon their arrival at Bremen.

The bills of lading were sent forward early in July, and they would have arrived at Bremen certainly within the month of July, before the war broke out, and in the ordinary course of business one would have expected the agents in Bremen to have communicated with their people in New York, informing them exactly what they had done, or what they were doing, or what they intended to do, with reference to these goods. It is said that we have here the original bills of lading. It is enough for me to say that I have very grave doubt about that matter. The bills of lading were sent forward. One of the affidavits says that it had been intended to endorse the bills of lading, and that the fact that they were not endorsed was due to some omission on their part.

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How were these documents which have been produced to the Court procured after the outbreak of war? They must have been procured by means of the post—by means of postal communications or telegraphic communications between America and Germany — and everybody knows that, although it is difficult to have postal communication between this country and Germany, postal communication goes on in the ordinary way (subject to some delay) between Germany and the United States. It was obvious to the persons who made these various affidavits that the bills of lading would be required to be produced in these proceedings. Yet I have not before me a single letter from them to anybody concerning the bills of lading, nor a single letter to them from anybody forwarding the bills of lading. One of the documents produced is said to be an invoice (it is dated September 2, 1914, a couple of months later than the shipment), but there is no explanation whatever before the Court as to how that document came into existence, except in so far as the information was vouchsafed or suggested in the speech of the learned Counsel for the claimants. As I understand Mr. Dunlop, he puts it for-



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ward as a genuine document as of September 2, 1914. I fail entirely to see how that document could have come into existence at that time as a genuine document. If it purports to be a copy of some document, it would have been easy to say, "This is a copy made in September, 1914, of some document which existed before." The document is headed :

Invoice of 342 hogsheads of Tobacco shipped on board the German ship *Roland*, from New Orleans to Bremen at the rate of Forty shillings plus 5 per cent. primage per hogshead for account and risk of whom it may concern and consigned to order.

I cannot regard that document, without some better explanation, as a contemporaneous invoice in a business transaction.

The goods having been shipped by this firm in America on board a German vessel, and consigned to Bremen to consignees in business in Bremen, I have ample justification for deciding that these goods were enemy goods, in the absence of clear evidence to the contrary. So far from the evidence being clear, I think it leaves the matter in a much worse state than that of doubt. Therefore I have no hesitation in deciding that these goods were enemy goods, loaded in an enemy ship, destined for delivery to enemy purchasers ; and that the claimants have accordingly failed to establish the case that they set out to establish, viz., that the goods were the goods of neutrals, the property in which still remained in them. Mr. Dunlop, towards the end of his argument, appealed to me to say that if the evidence now before the Court was not deemed to be sufficient to establish the ownership in the claimants, further time should be given to them to produce further proof. I have already commented on the fact that their appearance in these proceedings was on September 7, more than six months ago, and that their first affidavit was sworn on

October 13. These proceedings have been long pending, and there has been no attempt on their part to supplement what obviously must have been considered to be defects in the evidence that they were prepared to bring before the Court. Therefore, I cannot give the further time asked for, nor order any further proof in the matter. My judgment is that these 342 hogsheads of tobacco claimed by Messrs. Wessels, Kulenkampff & Co. are condemned as enemy property.

The remaining claim relates to a quantity of tobacco, consisting of 50 hogsheads shipped by Messrs. Meyer & Co. as shipping agents for Messrs. Rudolf, Hach & Co. The first question to be determined is whether or not Messrs. Rudolf, Hach & Co.—whose commercial domicile was American, and who for the purposes of this case are regarded as neutrals—are entitled to three-fourths of the 50 hogsheads, or of the proceeds of three-fourths of the 50 hogsheads, or whether they are entitled to the whole. The firm of Rudolf, Hach & Co. have been in the habit of buying, on what was clearly a joint adventure, certain tobacco from Kentucky, which they sent to Bremen, for the purpose of being sold there. The people who were interested in that joint adventure were this firm of Rudolf, Hach & Co., of Tennessee; Suhling & Co., of Virginia; and Christopher Suhling, of Bremen. The business was carried on apparently in this way: Rudolf, Hach & Co. purchased tobacco on the joint account of themselves and the other two houses whom I have named. They were responsible for two-fourths, Suhling & Co., of Virginia, for one-fourth, and Christopher Suhling, of Bremen, for the other one-fourth.

The question which I have to decide is whether or not Christopher Suhling was entitled to one-fourth of the 50 hogsheads, or the proceeds of it. With reference to the three-fourths of the cargo, the Crown at the hearing did

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not make any claim to it as prize. They were willing to admit (without arguing the matter) that the three-fourths portion belonged to Rudolf, Hach & Co. as to two-fourths, and to Suhling & Co., of Virginia, as to one-fourth. On September 15 the solicitors for Rudolf, Hach & Co. entered appearance for Rudolf, Hach & Co., who claimed to be owners of three-fourths of the 50 hogsheads; on September 30 the same solicitors entered an amended appearance, claiming that Rudolf, Hach & Co. were owners of two-fourths, and that Suhling & Co., of Virginia, were owners of one-fourth. On November 20 they entered a further appearance on behalf of Rudolf, Hach & Co., who claimed at that time to be entitled to three-fourths of the 50 hogsheads, and of Suhling & Co., of Virginia, who claimed to be entitled to the remaining one-fourth. This last appearance excluded entirely the ownership of Christopher Suhling, of Bremen, whom up to that time by their own acts they had acknowledged to be the owner of one-fourth. The explanation of these various appearances is dealt with in paragraph 12 of the affidavit of Mr. Robert S. Rudolf, as follows :

When I first heard that the ship had been seized I caused to be claimed on behalf of my firm and the firm of Suhling & Co., Virginia, three-fourths only of the tobacco. This was because I had in mind the agreement, under which the result of the re-sale, profit or loss, was to be participated in by the three firms, in accordance with a standing agreement, and I was under the belief that the ownership of the tobacco belonged to those three firms, in the proportions mentioned, and if this were true, then my firm, together with the firm of Suhling & Co., would be entitled to claim, between us, only three-fourths, but since the time when I first caused claim to be made on behalf of my firm and Suhling & Co., it has come to be known to us that we have no available recourse whatever to enable us to collect from C. H. Suhling payment for his supposed one-fourth interest in this tobacco, and we have not, either before or since the date of this shipment, received any sum whatever from

C. H. Suhling on account of or in respect of the shipment, nor is there any sum due or owing from my firm to him on any account whatever.

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That paragraph, so far from weakening the case made by the Crown that Christopher Suhling, of Bremen, was entitled to one-fourth, rather strengthens it. Moreover, I observe that on August 25, 1914, these gentlemen in America (Messrs. Rudolf, Hach & Co.) write to the United States Embassy in London a letter in which the following paragraph occurs :

You will see by the certified statement that we own one-half interest in this shipment while one-fourth interest each is owned by Mr. Christopher H. Suhling, the consignee in Bremen, and Messrs. Suhling & Co., of Lynchburg, the latter being also *bona-fide* citizens of the United States (naturalized).

Looking at the whole of the transactions as they are disclosed by the documents which have been put before me, not only as a lawyer, but also from a business point of view, I have come to the conclusion that these 50 hogsheads of tobacco were bought by Rudolf, Hach & Co. for the joint adventure which I have described, and that one-fourth of the goods belonged to Christopher Suhling, of Bremen. The result is that this one-fourth share of the 50 hogsheads, or of the proceeds if they have already been sold, is declared to be enemy property, and I decree the condemnation of it accordingly. The remaining three-fourths I decide belongs to neutrals and must be released or restored.

Now comes the further point, which is not only important in this case, but will probably affect other cases as well—as to whether the captors of the vessel are also entitled as against the cargo which has been released—the three-fourths of the 50 hogsheads—to some freight. The



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Crown claim to have a lien for the freight payable in respect of the portion of the cargo released, and to have the freight paid to them before the release. The argument on behalf of the Crown is that the shipowners are by the German commercial law entitled to some freight in respect of this released cargo, although it was not, and cannot now be delivered in Germany at the port of destination; and that as captors they are entitled to what the ship has earned as well as to the ship herself. This sounds quite logical, but the practice of the Prize Court (which has to deal with multifarious business affairs) shows that, although substantial justice is done, the results which strict logic might appear to involve cannot always be attained. The old rule as to whether captors of an enemy vessel were also entitled to freight was quite clear. Whenever a captor brought goods to a port of destination according to the intent of the contracting parties he was held entitled to the freight on the ground that the contract had been fulfilled, but in all other cases he was held not entitled to freight, although the ship might have performed a very large part of her intended voyage.

The rule was laid down in the case of the *Fortuna*\* and the *Vrouw Anna Catharina*†; and some exceptions which emphasized the rule were dealt with in the *Diana*‡ and the *Vrouw Henrietta*.§ The rule is also explained by Mr. Justice Story in the *Ann Green*.|| I have been asked to abandon this rule where, according to the contract, it appears that some freight might be recoverable where only part of the intended voyage has been covered. So far as I know, the rule has never been departed from; and in a collection of cases published in America in 1906 it is still regarded

\* (1802), 4 Ch. Rob. 278; 1 E.P.C. 392.

† (1806), 6 Ch. Rob. 269; 1 E.P.C. 552.

‡ (1803), 5 Ch. Rob. 67; 1 E.P.C. 424.

§ (1803), 5 Ch. Rob. 75, note; 1 E.P.C. 427, note.

|| (1812), 1 Gallison, 274, at page 293.

as the rule of International Prize law. (See Scott's *Cases on International Law*, pp. 631 and 632.)

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Evidence was given before me as to the German commercial law, to the effect that some freight depending on distances, times, expenses, risks, &c., is recoverable by the shipowner or person entitled to the freight in certain cases (captures as prize included) where the whole intended voyage has not been performed. I have looked at a translation of the sections of the Code referred to, and it seems to me that many serious questions of law might be raised in an action to recover such freight. I was not informed, and I do not know, whether such an action has ever been brought in Germany in cases where ships have been captured; most probably, almost certainly, not.

The principle which gave birth to the rule referred to was not whether any and what sum could be recovered at law under the terms of the particular contract of affreightment. The rule was based on the broad business ground that the goods had not been carried to the place where the contracting parties intended them to be delivered and disposed of. It has been stated on oath in this case that there was no market in the United Kingdom for this particular kind of Kentucky tobacco; that the European market for it was Germany and Holland. That may or may not be the fact. If it be, the hardship upon the neutral owners of having to pay freight to the captors is obvious. It has been pointed out in the authorities that sometimes the advantage would be on the side of the cargo and sometimes on the side of the vessel. But

. . . the possible advantage or disadvantage of an interruption of the original intended voyage is but an accidental circumstance to which the Court will but slightly attend. It would introduce a labyrinth of minute considerations through which the Court could not find its way.

It would also necessitate in cases like the present a close



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investigation of all the terms, conditions, and circumstances involved in the contractual obligations of the parties, and of their rights and liabilities under foreign municipal law, which this Court has always refused to undertake. The old rule as stated above must, in my opinion, still be adhered to as part of the law of nations. The cargo, viz., three-fourths of the 50 hogsheads, will, therefore, be released to the neutral owners without carrying the burden of any freight.

Mr. DUNLOP : I wish to make an application under Order XLIV., Rule 2 of the Prize Court Rules, for the admission of an appeal as of right. As your Lordship knows, the Act gives the right of appeal as of right, but the application has to be made to this Court for the admission of the appeal, in order to fix the security and the period within which the record is to be lodged. I formally ask your Lordship for leave to admit the appeal, and that there may be security fixed, and as to the time within which the appeal must be brought.

Mr. HILL said he would not oppose.

The PRESIDENT : I have always been told that the appeal is of right, but I do not know whether it is so.

Mr. HILL : I always understood it is of right, though I never understood what is meant by the admission of an appeal.

The PRESIDENT : All I have to do is to fix the security.

Mr. DUNLOP : What your Lordship has to do is to give leave to admit the appeal, which is the preliminary to the Registrar fixing the amount.

Mr. HILL : I hope your Lordship will fix the amount. Your Lordship has fixed it several times, and your Lordship has mentioned the figure before.

The PRESIDENT : I do not mind giving formal leave to appeal if the appeal exists as of right.

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Mr. HILL : That means that if it did not exist as of right your Lordship would not give it.

Mr. DUNLOP : It is as of right ; but I have to make this application.

The PRESIDENT : As Mr. Dunlop says that the appeal is as of right, and as Mr. Maurice Hill does not contend to the contrary, leave to admit the appeal ; £250 security.

Mr. HILL : Would your Lordship give the time ?

Mr. DUNLOP : We have to communicate, as your Lordship will appreciate, to get their instructions, and I suggest a couple of months.

Mr. HILL : Six weeks I would suggest.

Mr. DUNLOP : Six weeks will do.

Mr. HILL : Your Lordship did not say condemned and sold.

The PRESIDENT : I said I did not know whether the property had been sold or not.

Mr. HILL : No, it has not been sold.

The PRESIDENT : Then I pronounce condemnation and order the sale.

Mr. HILL suggested that as regarded Rudolf, Hach & Co.'s parcel the proper course might be to sell the whole and release three-fourths of the proceeds, or if a fair valuation could be made the Crown might release the three-fourths of the value.

Mr. W. N. RAEBURN (for Messrs. Rudolf, Hach & Co.) said that if there were a forced realization by the Crown,



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and a distribution of the proceeds, a good deal of value would be lost. He suggested that as his clients had facilities for disposing of this class of tobacco, they might, on giving a suitable bond and bank guarantee, be allowed to dispose of the whole 205 hogsheads, and then pay into Court one-fourth of the proceeds. He thought that the matter could be left to the Procurator-General.

The PRESIDENT : That will be done through the Marshal and not through the Procurator-General.

Mr. HILL : If there is any difficulty we might refer to your Lordship.

The PRESIDENT : You might sell your one-fourth to them and give them the 50 hogsheads, or you might instruct them to deal with the whole 205 on their undertaking to account for the one-fourth.

Mr. RAEBURN : Of course, we have both the same interest, and if we may in case of necessity apply to your Lordship again——

The PRESIDENT : You had better say, " With liberty to apply as to the sale or disposal of the property condemned."

Mr. RAEBURN asked if in the case of cargo which was released as neutral cargo his Lordship had ever decided whether the warehouse charges should be paid by the captors or should fall on the owners of the cargo. He admitted that there was reasonable cause for seizing this tobacco.

The PRESIDENT : I think the Marshal will require that the warehouse charges shall be paid to him by the people to whom the cargo is released.

## COUNSEL

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For the Crown	...	...	...	<i>Maurice Hill, K.C.</i> <i>D. Stephens.</i>
For Messrs. Rudolf, Hach & Co.	...	...	...	<i>D. C. Leck, K.C.</i> <i>W. N. Raeburn.</i>
For Messrs. Wessels, Kulenkampff & Co.	...	...	...	<i>C. Robertson Dunlop.</i>

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## SOLICITORS

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For the Crown	...	...	...	<i>The Treasury Solicitor</i> <i>for the Procurator-General.</i>
For Messrs. Rudolf, Hach & Co.	...	...	...	<i>Hewitt, Urquhart &amp; Woollacott.</i>
For Messrs. Wessels, Kulenkampff & Co.	...	...	...	<i>Hill, Dickinson &amp; Co.</i>



British Steamship  
**"LINARIA."** 3081 Tons.  
 (Part Cargo *Ex.*)  
 (J. O. WILLIAMS, *Master.*)

*Owners :* Stag Line, Ltd. (J. Robinson & Sons),  
 North Shields.

This case is also reported

**59 S. J.** 530.

**31 T. L. R.** 396.

*British Ship—Turkish Shipper—Goods Consigned to London  
 before War with Turkey—Arrival in London after Declaration of  
 War—Subsequent Advance by British Agents for Sale—  
 Condemnation.*

Goods shipped at Bagdad for London by a Turkish subject were delayed at port of transhipment by the action of the British Government. They were subsequently forwarded in a British vessel, but in consequence of the delay they did not arrive until after the commencement of the war with Turkey. They were consigned for sale to a firm of British merchants, who after their arrival made an advance on the security of the goods.

The Court held that the case was governed by the principle applied in the *Odessa* (1914), ante, Vol. I., p. 301, and disallowed the claim of the British merchants.

Mr. H. C. S. DUMAS (for the Crown) asked for the condemnation of 14 bales of lambskins sent from Bagdad by one Abdul Azoz to London to order, and transhipped at Bussorah on to the British steamship *Linaria*. There was a small claim—£8 1s. 10d.—for freight, and he asked that it should be paid.

There were also 77 bales of wool similarly sent by Hajji Abdul-Hussein Bahramy, and in that case Messrs. Frederick Huth & Co., London, who had accepted a bill of

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STEAMSHIP  
 "LINARIA."

Before the  
 Right Hon.  
 Sir Samuel  
 Evans,  
 President of  
 the Probate,  
 Divorce, and  
 Admiralty  
 Division.

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exchange drawn on them in Bagdad, made a claim as owners and alternatively as pledgees. He, however, submitted that this claim was undistinguishable from that in the *Odessa*,\* and that in these circumstances it was not a good claim. A licence had been obtained from the Committee of Trading, but it did not affect the claim.

Mr. STUART BEVAN (for Messrs. Huth & Co.) said that the wool was shipped by a Turkish trader in Bagdad to the order of the shipper, the bills of lading being endorsed to Messrs. Huth & Co., who received these goods in London and were to sell them on commission. They advanced £400 against the value of the goods, a draft being drawn on them to that amount and paid by them.

Upon these facts he contended that there were two points of difference between this case and the *Odessa*. First, this was not an advance by bankers, but by a selling firm in England to whom the goods were entrusted for sale. That was a distinction in fact, even if it could not be said to be a distinction in law. Secondly, in the *Odessa* and the *Cape Corso* the goods were consigned to Germans. Here the destination of the goods was London, they were consigned to no enemy, and they were on a British ship.

In reply to the President, he admitted that the goods were those of the shipper on the decision in the *Odessa*, but he knew of no principle of law in the *Odessa* that applied where the goods were an enemy's goods but consigned to this country.

Mr. DUMAS said that point was dealt with in the *Woolston*.†

Mr. BEVAN said that case had not yet appeared in the books, but he urged that there were fundamental differences where the goods were not consigned to an

\* (1914), ante, Vol. I., page 301; reported on appeal, post, in this Volume.

† (1914), ante, Vol. I., page 332; reported on appeal, post, in this Volume.



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enemy. There was, however, another argument he wished to place before his Lordship. These goods were shipped under a bill of lading dated July 30, from Bagdad for transshipment at Bussorah to another vessel, and in the ordinary course of events they would have arrived in this country before the outbreak of war with Turkey. But in August the British Government gave orders that ships should not take cargo from Bussorah, and in fact commandeered some of the vessels in that port. The result of the action of the Government was that for some two months there were no shipping facilities in Bussorah, and these goods had to remain there until October, when a ship was found for them, and they reached this country on December 18. Otherwise they would have been in London weeks before the declaration of war with Turkey, which was on November 5. He submitted that the Government could not now be allowed to take advantage of the state of affairs they had themselves created and be "heard in prize."

The PRESIDENT : It is not the Government who claim.

Mr. BEVAN : An official of the Government.

The PRESIDENT : No, it is the act of the Crown.

Mr. BEVAN said it was also the act of the Crown which prohibited the shipment of the goods in the Persian Gulf, and the Crown now asked for the condemnation of the cargo, having itself brought about this state of things. It would be inequitable if such a claim were allowed.

Mr. DUMAS (in reply) said that Messrs. Huth & Co. accepted this bill of exchange with a full knowledge of all these facts, because they did not accept it until February 13. The claim of Mr. Bevan now was that an alien enemy was to be allowed to retain his goods because, while he was still a neutral, he might have been somewhat

damnified by the action of the Government. That, he submitted, was not a sound contention in law.

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In answer to the President, he said that bail had been given for the goods to the amount of £560.

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### JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*): There are two lots of cargo to be dealt with in this case. The first is 14 bales of tanned skins shipped by a Turkish gentleman to his own order in London. The Crown claims it as enemy property. It clearly was; and it must be condemned as prize.

The other portion of cargo is 77 bales of wool. To this a claim is made by Messrs. Huth & Co., and Mr. Bevan has urged that this case is dissimilar to that of the *Odessa*.\*

The goods were shipped before the outbreak of war with Turkey, and were intended to be transhipped at Bussorah, on to another steamer. It is admitted by Mr. Stuart Bevan that, apart from any question which arises from Messrs. Huth's claim, the owner was an enemy subject, a Turk. I have been asked to say that the fact that difficulties arose at Bussorah which caused delay in transhipment has estopped the Crown from being entitled to capture these goods. There is no ground for that contention. The goods when captured were enemy goods, and were subject to capture. As to Messrs. Huth & Co., it was argued that they are not bankers, and they are not, therefore, in the position of Schröder & Co. in the case of the *Odessa*; that they were agents for sale on commission. They were asked to advance £400 to the owners on the owners' draft on October 8, 1914, at four months, and it is said that because they made that advance they

\* (1914), ante, Vol. I., page 301; reported on appeal, post, in this Volume.



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became converted into owners. I think the case against them is, if anything, stronger than that against the claimants in the *Odessa*.

Another point of distinction made by Mr. Bevan was that the goods were not consigned to an enemy's country, but to London. That is immaterial. All I have to determine is: Were they the goods of an enemy? And I find they were. The fact that they were sent to London does not make any difference.

The goods were released to the claimants on bail for £560, given by the bankers on their behalf. That £560 may be taken as the value of the goods if sold, and therefore the advance of £400 was only an advance for a sum considerably short of the value of the goods seized.

In my opinion this case is governed by the principle of the *Odessa*, and on the facts the goods were in law enemy property. They were properly seized and must be condemned. It follows that the amount of the bail must be paid into Court.

Mr. BEVAN asked that the time for an appeal might be extended until the appeal in the case of the *Odessa* had been disposed of.

The PRESIDENT consented.

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#### COUNSEL

For the Crown	...	...	<i>H. C. S. Dumas.</i>
For the Claimants	...	...	<i>Stuart Bevan.</i>

#### SOLICITORS

For the Crown	...	...	<i>The Treasury Solicitor</i> <i>for the Procurator-General.</i>
For the Claimants	...	...	<i>Waltons &amp; Co.</i>

British Steamship  
**"POONA."** 7626 Tons.

(Part Cargo *Ex.*)

(A. E. A. BAKER, *Master.*)

*Owners:* Peninsular & Oriental Steam Navigation Co.,  
 London.

This case is also reported

**84 L. J. P.** 150.

**59 S. J.** 511.

**112 L. T.** 782.

**1 Trehern,** 275.

**31 T. L. R.** 411.

*Company—British Register—Enemy Directors and Shareholders—Goods of Company so Constituted—Method of Dealings with Goods after Release—Alien Enemy Ownership of British Ship.*

The Court held that a company incorporated in England was a British company, although all the shareholders were alien enemies, and that goods belonging to the company could not be condemned on the ground that they were enemy goods.

The question whether the principle of the decision is applicable to a British vessel owned by such a company reserved.

Judgment of the Court of Appeal in *Continental Tyre, &c., Co., Ltd. v. Daimler Co., Ltd.* [1915], 1 K.B. 893, followed.

The Crown in this case asked for condemnation of five cases of electric fans seized on board the P. and O. steamship *Poona*, in London, on October 17, 1914. The goods were claimed by Isaria, Ltd., a company duly incorporated in England on May 30, 1912.

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 "POONA."

Before the  
 Right Hon.  
 Sir Samuel  
 Evans,  
 President of  
 the Probate,  
 Divorce, and  
 Admiralty  
 Division.



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Mr. JOHN B. ASPINALL, for the Crown, said that the fans were sent from Germany at some time before the outbreak of war by a firm called Isaria Zählerwerke, of Munich. The outer wooden cases in which the goods were packed bore labels printed in Germany, and also had the words "Made in Germany" stencilled upon them, and each of the fans was wrapped in paper bearing printed German labels. They were sent to Australia by the steamship *Rheinland*. Having reached Australia before the outbreak of war, they were sent back to this country to Isaria, Ltd.

They were sent back to this country on the steamship *Poona*, consigned by Messrs. Lascelles Parrington & Braché, of Melbourne, to order, London. They were seized by the Customs authorities in London on October 17, 1914.

The PRESIDENT: How did the firm in Melbourne get possession of the goods?

Mr. ASPINALL: They were handed over to them by one Brandl, who is alleged to be the Australian traveller of the English company, but who, I shall ask your Lordship to say, was the Australian traveller of the German company. I submit that these goods were so tinged with German interest that they ought to be condemned.

The contention on the other side is that the goods are the property of an English registered company.

Mr. Aspinall referred to the case of the *Tommi* and the *Rothersand*,\* and to what his Lordship said when dealing with the question of an English company consisting entirely of aliens. One passage in the judgment in that case was particularly apt to the present. It ran:

These technicalities have not been allowed to bind the decisions of the Prize Courts. . . . They are treated rather as gossamer, which can be brushed entirely

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\* (1914), ante, page 1.

aside; because the Prize Court regards the essential qualities of any transaction, and tries to arrive at the realities of a case.

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A little later on his Lordship said :

It is no doubt the case that a company registered in this country has, under the Companies Acts, a separate entity, and that such a company can own a ship. Whether a company consisting entirely of aliens can own a ship is a question which probably has never arisen, and it has, therefore, never been decided. I am not sitting here dealing with the municipal law to-day, and therefore I am not called upon to decide the point at all, but I do not want it to be assumed that the Prize Court could not say, looking at the reality of the thing, that, even if the transfer had been completed . . . this vessel ought nevertheless to be regarded as a German vessel, under the circumstances.

The PRESIDENT : That was before the decision of the Court of Appeal in the Continental Tyre Company's case.\*

Mr. ASPINALL agreed. In that case the head note in *The Times* Law Reports was this :

*Held* (Buckley, L.J., dissenting) that an action of debt is maintainable by an English company, of which all the directors and shareholders are alien enemies.

In that case Lord Justice Buckley delivered a dissenting judgment of very great strength and force. Within two or three days of the Court of Appeal giving its decision Lord Lindley wrote a letter† to *The Times*, in which he had the good fortune to agree with Lord Justice Buckley.

\* [1915] 1 K.B. 893; 31 T.L.R. 159. The decision in this case was afterwards reversed by the House of Lords for reasons which do not seem to impair the decision that *Isaria, Ltd.*, was a British company.

† The letter referred to (see *The Times* of January 28, 1915) reads as follows :

To the Editor of *The Times*.

Sir,

The classification for legal purposes of foreigners into alien friends and alien enemies and the distinction between their respective rights and duties have been long familiar to lawyers, although sometimes overlooked by some of them. The Court of Appeal has lately had occasion to consider the rights of aliens—i.e., Germans—to bring actions in this country during the war which is unfortunately now raging. The Court gave two judgments, reported in *The Times* of January 20. In the first, which was unanimous.



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The PRESIDENT : Or *vice-versa*. Lord Justice Buckley had the good fortune to agree with Lord Lindley. It must be remembered that the law is as decided by the majority of the Court of Appeal. My decision in the *Tommi* and the *Rothersand*\* was cited in the course of the arguments in the Court of Appeal, but the Court did not deal with it in their judgment ; and the point before me was a narrow one. It had special reference to the character of the property—a ship.

Mr. ASPINALL also referred to his Lordship's judgment in the case of the *Roumanian*† so far as it related to this question of a company. Part of the head note to the report of the case in the Law Reports‡ was :

*Held*, further, that the company owning the oil, being registered and having its place of business in Germany, must be treated, for prize purposes, as an enemy, although

the whole subject was fully examined and admirably dealt with, and the right of an alien friend to maintain such an action and the absence of such a right in an alien enemy was conclusively shown and decided. But in another case before it, and decided at the same time, the same Court, with one dissentient (Lord Justice Buckley), came to the startling conclusion that a joint stock company registered and incorporated under the Joint Stock Companies Acts, but completely under the control of Germans resident in Germany, was an alien friend and entitled to maintain an action in our Courts, and not an alien enemy and therefore unable to do so.

This decision is so important and opposed to the principle of public policy underlying the law which prevents alien enemies from suing in this country whilst our country is at war with theirs, that I trust that the decision will be reconsidered by appeal to the House of Lords. If not reversed, I hope that a short Act of Parliament will be passed to alter the law in this respect.

The short grounds on which I think the decision wrong are that it sacrifices substance to form and justice to fiction. Corporations are regarded as persons ; but this is only a convenient form of expression ; and a fiction which, if treated as a fact and made a basis from which to infer consequences, may lead to grotesque and mischievous results. *In fictione juris semper aequitas existit* is a well-known legal maxim which ought to be borne in mind. What sort of person ought such a corporate body as the Court had to deal with to be regarded ? There is no law that I know of which excludes the answer that common-sense suggests. The persons seeking to sue were in fact alien enemies under cover of a fictitious name.

LINDLEY.

\* (1914), ante, page 1.

† (1914), ante, Vol. I., 191, at page 279 ; affirmed November 10, 1915, by the Privy Council, and reported on appeal in this Volume.

‡ [1915]. P. 26.

the company was in the nature of a combine, as it included, to the extent of 90 per cent. of the shares, Roumanian, Russian and other companies neutral or allied.

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The PRESIDENT: That case is now on its way to the Privy Council. I do not think that Mr. Maurice Hill, for the claimants in that case, dealt with the point about the company being regarded as German. He said :

It is admitted that the Europäische Petroleum Company, owning the oil, is a registered company with its principal seat in Germany; but it is a combine with shareholders of all nationalities, and if, strictly, the goods are deemed enemy goods, and condemned as prize, practically the enemy will not be harmed, as it will be our allies and neutrals who will suffer, for the company, being a combine, its shareholders are Belgians, French, Russians, Roumanians, &c.

Mr. ASPINALL: I do not wish to press the *Roumanian*.\* I only wish to recall it to your Lordship's mind.

He then referred to an affidavit made by Mr. Frank Morton, manager of Isaria, Ltd., of 208, Tower Bridge Road, in support of the claim. Mr. Morton said that he was a British-born subject. The claimants were a duly incorporated English company and carried on business in this country. They were, *inter alia*, merchants, and dealt in electrical appliances, including electric fans.

The company had issued 1,250 shares of £1 each of their capital, and of these 1,244 were held by Isaria Zählerwerke, of Munich, a German Corporation. The four directors of Isaria, Ltd., Dr. Edward Bloch, Julius Geyer, Joseph Hackl, and George Proebst, who were at present resident in Germany, each held one share; a Mr. Schoenmann also held one share, and it was believed he was in Germany too; and the remaining issued share was held by a Mr. Vallée, who was a French subject, and was, Mr. Morton believed, at present in France.

\* (1914), ante, Vol. I., page 191.



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The affidavit proceeded :

I have been in the employ of the Claimants since the 21st July, 1913, and am familiar with the business carried on by the Claimants, and on the 3rd August, 1914, I was appointed to act as Manager of the Claimants and also requested to perform the necessary secretarial duties. . . . The Claimants purchased goods from several firms, but, so far as electrical fans are concerned, the claimants have, in the past, principally purchased the same from the said Isaria Zählerwerke, which is a manufacturing concern.

The Claimants' traveller in Australia and India was and is one Charles Brandl, and on the 18th December, 1912, the said Charles Brandl wrote the company a letter from Cawnpore containing suggestions as to the market in Australia for electric fans, and requesting certain goods to be shipped.

That was a letter in which Mr. Brandl dealt with the prospect of getting business from India, the East generally, and Australia.

The affidavit went on :

The Claimants received the said letter from Charles Brandl on the 4th January, 1913, and, the matter having been considered, an order was given by the Claimants on the 18th March, 1913, to the said Isaria Zählerwerke for the purchase of certain goods, which included the electric fans in question in this suit. The said Isaria Zählerwerke were requested by the Claimants to send the goods direct to Australia, and on the 9th May, 1913, the said goods were duly invoiced by the said Isaria Zählerwerke to the Claimants. . . . The said goods were duly shipped to Australia on board the s.s. *Rheinland*.

The Claimants have had many transactions with the said Isaria Zählerwerke in the purchase of goods, and the Claimants have paid the said Isaria Zählerwerke for the whole of the goods they purchased as enumerated in the said invoice of the 9th May, 1913. There was a general account between the Claimants and the said Isaria Zählerwerke subject to three months' credit, and the Claimants from time to time paid them sums of money on account. I have caused to be extracted from the Claimants' books a list of goods purchased from and payments made by the Claimants to the said Isaria Zählerwerke, which includes

the electric fans in question, and from such extract it will be seen that the Claimants have paid for the goods. . . .

The Claimants' agents in Australia are Messrs. Lascelles Parrington & Braché, of Melbourne, and on the 9th May, 1913, the said goods as enumerated in the said invoice of Isaria Zählerwerke of the same date were consigned by the Claimants to the aforementioned Charles Brandl, Claimants' Australian traveller, and by him handed over to the said agents on sale or return in accordance with the Claimants' course of dealing with the said agents, and a *pro forma* invoice was sent to the said agents. . . .

A quantity of the goods so consigned as aforesaid to Messrs. Lascelles Parrington & Braché have been kept and will be paid for by them, but in or about the month of August, 1914, the said agents returned to the Claimants the five cases of electric fans in consequence of the same being unsuitable for the Australian market. . . . Consequently the said agents have incurred no liability to the Claimants in respect thereof.

The said agents shipped the said five cases at the Port of Melbourne on board the s.s. *Poona*, and I am informed on or about the 17th October, 1914, the said five cases were captured and seized at the Port of London. . . .

For the several reasons above set out the Claimants claim to be the true, lawful and sole owners of the five cases of fans. . . .

Mr. ASPINALL said that, looking at the reality of the transaction, his case was that the goods were probably the property of the German company in Munich. But even if they were not, but were the property of the company registered in this country, then he contended, for the purpose of prize, that the company was so German that if the goods belonged to them they ought still to be condemned. He asked his Lordship to follow up what he said in the *Tommi* and the *Rothersand*\* and look at the "realities of the thing."

The PRESIDENT: Since that time the decision of the Court of Appeal has been given.

\* (1914), ante, page 1.

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Mr. ASPINALL : With regard to that decision I am going to submit that this British company has a separate entity, so for the purpose of prize, quite apart from the decision of the Court of Appeal, your Lordship sitting here with a discretion and with an ability to look through the transaction, will condemn these goods.

The PRESIDENT : It may be that the decision of the Court of Appeal does not bind me, as, of course, appeals from the Prize Court are to the Privy Council. On the other hand, it would be inconvenient if I decided one thing and the Court of Appeal another.

Mr. ASPINALL : My submission is that your Lordship is not bound by the Court of Appeal in Prize cases. When one finds Lord Justice Buckley, who has a great experience in company law, differing from the other members of the Court, and when one finds that Lord Lindley, in a letter a few days afterwards, agrees with him, I invite your Lordship to consider very seriously whether, looking through the fog of this class of affidavit, you cannot see the light and the real truth of the matter, and, to use your Lordship's own expression, brush aside the gossamer.

The PRESIDENT : Perhaps that expression was a little too strong.

Mr. ASPINALL : I think it was an expression extremely apt for the purpose of that case and very suitable for my argument.

Mr. A. W. ELKIN, for the claimants, submitted that where the goods were shipped and seized in a British ship trading between two British ports, the onus was on the Crown to prove that the goods were of an enemy character.

The PRESIDENT : No.

Mr. ELKIN said that then he submitted the goods were clearly the property of a company incorporated in this

country, and as such were not liable to capture. The transaction was a simple one. The goods were ordered from the Munich company by the British company, and were sent direct to Brandl, the British company's Australian traveller, and he handed them over to the British company's Australian agents, Messrs. Lascelles Parrington & Braché on the terms of sale or return. The goods proved not to be suitable for the Australian market, and the agents shipped them back to London. At the time of seizure, therefore, they were the property of the English company. Having regard to the fact that the claimants were a company duly incorporated in this country, they were entitled to the release of these goods, on the authority of the decision of the Court of Appeal in the case of the *Continental Tyre Company v. Tilling*.\*

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The PRESIDENT: Supposing this company, constituted as it is, wanted to buy ships, could it own them?

Mr. ELKIN said that point had not been decided.

The PRESIDENT said it would be strange if they were the owners of the ship and also the cargo, and were held entitled to the cargo and not to the ship.

Mr. ELKIN said he relied very strongly on the decision of the Court of Appeal.

The PRESIDENT said he was willing to pay all deference to the decision of the Court of Appeal, but it did not bind him in that Court. He might, after careful consideration, come to the conclusion that he ought to agree with Lord Justice Buckley's dissenting judgment.

Mr. ELKIN contended that on the facts it was clearly established that the property in the goods was in the company registered here.

\* [1915] 1 K.B. 893.



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Mr. ASPINALL, in reply, submitted that notwithstanding that these goods might belong to the Isaria Company, his Lordship should for the purposes of the Prize Court, apart from any other law, determine that they were subject to condemnation. He had no absolute authority for that, but he recalled the cases of the *Tommi* and the *Rothersand*\* cited previously.

The PRESIDENT (*to Mr. Aspinall*): Have you made up your mind now as to the persons who, according to your case, were the owners of these goods?

Mr. ASPINALL: My case is that either the German company owned the goods or the company registered in this country. In either case I say they are subject to condemnation as prize, and that the case is loaded with suspicion.

(The rest of the facts and arguments sufficiently appear in the judgment.)

The PRESIDENT: This case raises a curious question and a very interesting one. I would like to look into it. I will give my judgment later.

#### JUDGMENT.

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The PRESIDENT (*The Right Hon. Sir Samuel Evans*): The claimants to the goods seized and claimed in these proceedings (which consisted of five cases of electric fans) are a company named Isaria, Ltd., which was incorporated in May, 1912, and whose registered office at the time of the outbreak of war was 208, Tower Bridge Road, in the County of London.

The company carried on business in this country and abroad. The goods (with others) had been sent out to Australia for sale, and were returned to the company in August, 1914. They were seized in the Port of London as Prize, as droits of Admiralty, on October 17, 1914. After

\* (1914), ante, page 1.

investigation of the facts I was satisfied that the goods at the time of the seizure belonged to the company. The question which remained for decision was whether, having regard to the constitution of the company, the goods were enemy property subject to seizure.

At all material times the shares in Isaria, Ltd., issued were 1,250 shares of £1 each. Of these 1,244 were held by Isaria Zählerwerke, of Munich—a German manufacturing company; one share was held by each of the four directors of Isaria, Ltd., who were German subjects, and resident in Germany; one other share was held by one Schoenmann, the secretary of the company, also a German subject; the remaining share was held by one Vallée, who was said to have been a French subject, but who for some time before the war had resided at Munich, and been employed by the German company, the Isaria Zählerwerke.

Schoenmann left this country on August 3 last for Germany, having purported to appoint one of the company's employees—Mr. Frank Morton—to be manager.

Mr. Morton represented the company in these proceedings. After the outbreak of war he was informed by the Board of Trade that they were advised that there was no objection to the sale from stock of the company of goods imported from Germany before the war, and that no licence was required for that purpose. Later on (in November last) he was informed by the Comptroller of the Companies Department of the Board of Trade that as Isaria, Ltd., was a company incorporated in this country there was nothing (having regard to section 3 of the Trading with the Enemy Proclamation No. 2, dated September 9) to prevent trading with the company, or the payment to it of money which might be owing to it. So Mr. Morton appears to have carried on the business of the company; and the books and papers of the business have been inspected when required by the official accountant appointed by the Board of Trade.

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For the claimants it was contended that the goods belonged to an English company, not to alien enemies, and were not subject to seizure or confiscation.

On the other hand, it was argued for the Crown that as all the directors were enemy subjects and resident in Germany, and all the shareholders were also either enemy subjects or resident in Germany, that the goods were in reality the property of alien enemies, and ought to be condemned as such.

I was referred to my own decision in this Court in the *Roumanian*,\* and, of course, to the judgments pronounced later by the Court of Appeal in *The Continental Tyre, &c., Company, Ltd. v. Daimler Company, Ltd.*, and in *The same v. Thomas Tilling, Ltd.*†

I will only observe as to the *Roumanian* that it does not govern this case. The facts there were different in important and material respects; moreover, I think it will be found that in the course of the arguments in the *Roumanian*, Counsel for the claimants expressly admitted that the Europäische Petroleum Union Gesellschaft m.b.H. was a German company; and the case was dealt with accordingly.

The judgments of the Court of Appeal in the Continental Tyre Company cases (*sup.*), however, bear directly upon the point arising in the present case. What, therefore, ought I to do in this Court in view of those decisions?

In matters relating to Prize, the Court of Appeal does not bind this Court, for the reason that no appeal lies to the Court of Appeal from judgments given in the Prize Court. The only Appellate Court in such cases is the Judicial Committee of the Privy Council.

If I were of opinion that different principles applied in the present proceedings in a Court of Prize, or if I had

\* (1914), ante, Vol. I., 191, at page 279; affirmed November 10, 1915, by the Privy Council, and reported on appeal in this Volume.

† [1915] 1 K.B. 893.

formed a final opinion upon the legal aspect, even if the same principles were applicable, I conceive it would be my duty to give effect to such opinion even though it differed from that of the Court of Appeal.

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But I do not think that in the present case different principles ought to be applied. The matter in controversy appears to me to be one which should be regarded from the point of view of municipal law; and no question of an overriding principle of international law arises. The claimants come forward as a company incorporated in accordance with the law of this country. The claim is not made by the individual shareholders—subjects of a foreign country, enemy or otherwise. The question turns upon the status of the company in this kingdom, and the question falls to be decided under our municipal law. In these circumstances, I think it more respectful to the Court of Appeal to act in accordance with their judgment, however much I might feel inclined to sympathise with the dissentient views of Lord Justice Buckley. In the special facts of this case a decision in accordance with Lord Justice Buckley's judgment might be easy; but it is fairly obvious that with even a slight variation of facts as to the holding of the shares, the adoption of his judgment, and its application as a general principle, would give rise to great difficulties. I may observe that even in Lord Justice Buckley's dissenting judgment this passage is to be found :

The Corporation if it be a British Corporation stands in the same position for most purposes as a British subject. For instance, as regards rights of ownership of property, and the right to protection and assistance by the law. But while it stands for most purposes in the position of a British subject, it cannot, I think, be correctly described as a British subject.

The question before me deals with "rights of ownership." For the reasons stated I feel bound to accept respectfully the law as laid down by the Court of Appeal,



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and must leave the ultimate decision to a higher tribunal. If the judgment of the majority of the Court of Appeal is unsound, it must be so pronounced by the House of Lords on appeal from the Court of Appeal, or by the Privy Council on appeal from this Court. If it is affirmed as good law, but is considered to require alteration as a matter of just policy, then the Legislature must act.

I desire to add one word by way of reservation. The case of the ownership of vessels registered in this country is so special, having regard to our Merchant Shipping Legislation, that I venture to repeat what I said in the *Tommi* and the *Rothersand*,\* and to reserve expressly all questions which might arise if it were contended that a British vessel was the property of a company constituted like that of *Isaria, Ltd.*

The judgment of the Court is that the goods seized are not enemy property; and I order their release.

On their release they will be delivered over to Mr. Morton, the present manager of *Isaria, Ltd.*, and he, of course, will deal with them as belonging to the English company; and he will not be able to deliver them or their proceeds over to the alien enemy shareholders of the company, or to use them, or to apply their proceeds, for the benefit of any such shareholders, during the existence of the war.

\* (1914), ante, page 1.

#### COUNSEL

For the Crown ... .. *John Bridge Aspinall.*  
For the Claimants ... .. *A. W. Elkin.*

#### SOLICITORS

For the Crown ... .. *The Treasury Solicitor*  
... .. *for the Procurator-General.*  
For the Claimants... .. *Russell & Arnholz.*

British Steamship  
**"KALOMO."** 5019 Tons.  
 (Part Cargo *Ex.*)  
 (F. P. SWINNEY, *Master.*)

*Owners:* Ellerman & Bucknall S.S. Co., Ltd., London.

This case is also reported  
**[1916] P.** 176, note.

*British Ship—Goods Consigned by neutral Owners to del credere Agents in Germany—Alleged Sale to Dutch Buyer—Documentary Evidence of Sale in Germany—Condemnation—Question of Freight Referred.*

Goods were claimed by an American firm who had shipped them on a British ship to Rotterdam, consigned to *del credere* agents in Hamburg. The agents had paid them the greater part of the value of the goods. It was alleged that the agents had sold the goods to a buyer in Rotterdam; but there was no evidence in support of this statement, and there was some documentary evidence that the goods had been sold to German buyers. The Court disallowed the claim of the American firm on the ground that the property had passed from them, and condemned the goods as the property of enemies.

The SOLICITOR-GENERAL (*Sir Stanley Buckmaster, K.C.*), for the Crown, said that the claim related to a consignment of timber on board the steamship *Kalomo*, which sailed from New Orleans on July 24, 1914, and arrived in the Port of London on August 15. Several seizures of parcels of goods were made at different times in September. A great number of parcels of goods had been released. In respect of some there were no claims, in respect of others the claims had been dropped, and the only claim left was in respect of 2,532 pieces of rough chestnut lumber con-

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Before the  
Right Hon.  
Sir Samuel  
Evans,  
President of  
the Probate,  
Divorce, and  
Admiralty  
Division.



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signed by J. B. Ransom & Co., of Tennessee. The claim, put forward by Mr. Frank Tiffany, the duly appointed agent in this country of Messrs. Ransom & Co., was that the timber was consigned by the claimants to a firm of *del credere* agents, Messrs. J. F. Muller & Sohn, of Hamburg, who had sold it to a purchaser at Rotterdam.

The PRESIDENT : In the claim itself the ground is rather different.

The SOLICITOR-GENERAL said that was so, but he was indicating the nature of the claim as it emerged from the affidavits. The first obvious impression was that the claim was put forward on the ground that the goods had been sold by Messrs. J. F. Muller & Sohn to Rotterdam, but that was not the case now. It was now known that Messrs. J. F. Muller & Sohn, of Hamburg, acted as *del credere* agents of the claimants, and that on April 24, 1914, they sold a large consignment of timber, closely resembling the consignment in question, to Messrs. Luschka & Wagenmann, of Mannheim, and in notifying Messrs. Ransom & Co. that the sale had been effected they pointed out that they would be in the position in the course of time to effect a sale of another consignment of timber, which was of the shape and size of the consignment the subject-matter of the present suit.

The lumber in question was consigned on a through bill of lading dated June 26, 1914, from Nashville (Tennessee) to Rotterdam, for delivery to the order of Messrs. J. B. Ransom & Co., "notification to be given to J. F. Muller & Sohn, of Hamburg." The bill of lading was endorsed by Messrs. Ransom generally. On July 24 the *Kalomo* with the timber on board sailed from New Orleans. The bill of lading was a document of enormous importance. In the first instance it was not produced, and it was only after considerable discussion that it came to hand.

The claimants said that the difficulty they had was in getting into communication with Messrs. Muller & Sohn, to whom the bill of lading had been sent. However, the document ultimately was sent back, and it would be seen that it had German endorsements upon it, some of which had been cancelled. But there was no endorsement which justified the statement that the goods were sold in Rotterdam. Drafts for the value of the goods had been sent forward to Messrs. Muller & Sohn, with a request to them to accept and pay. Although there had been produced the actual contract made between Messrs. Muller & Sohn, and Luschka & Wagenmann, of Mannheim, with regard to the previous consignment of April 24, no contract had been produced to justify the suggestion that the goods in question had been sold in Rotterdam. Nor was it easy to see how, if, in point of fact, the goods were sold in Rotterdam and payment made for them, they could still be the property of the claimants. One of the endorsements on the bill of lading was by Luschka & Wagenmann, of Mannheim.

The PRESIDENT said that by means of a magnifying glass he made out that one of the cancelled endorsements was by "Mannheim Lagerhaus, 13/7/14."

The SOLICITOR-GENERAL explained that that was a financial house in Mannheim. He read an affidavit by Mr. T. R. Le Sueur, assistant secretary of John B. Ransom, in which the deponent stated :

J. F. Muller & Sohn, of Hamburg, Germany, have been acting as agents for my firm. On April 23 we received a cablegram from J. F. Muller & Sohn asking for authority to sell certain cars of chestnut lumber. We cabled Muller & Sohn proper authority, and under date of April 24 Muller & Sohn confirmed by letter their cablegram to us, and also acknowledged receipt of our cablegram to them.

Acting upon the information received from Muller & Sohn to the effect that they could sell for us the several

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cars of chestnut referred to, some were shipped, and among the shipments was one made on June 24, 1914, consigned to J. F. Muller & Sohn, Rotterdam, Holland. . . . The shipment was insured in the Boston Insurance Company, of Boston (Mass.), for 1,100 dols., and I attach copy of certificate of the insurance, the original having been forwarded to J. F. Muller & Sohn, with whom we are unable to communicate at the present time.

The firm of John B. Ransom & Co. do not sell to the consuming factories of Holland and Germany, but, on the other hand, all sales are made through lumber brokers (or agents), who arrange with the consuming factories as to prices, terms, &c.

The lumber agent ascertains the best prices he can obtain for certain stock, and advises us as to what he can do, and if acceptable to us we authorize him to close the trade for us.

It is usually arranged so that we, as shippers, can make draft for a certain per cent. of the invoice. The draft is made on the lumber agent, who collects for us the amount from the consuming factory or dealer, and for that reason the insurance is usually taken out in the name of the agent, or, in other words, it is made payable to the agent in case of loss. The agent has no interest in the shipment other than his commission.

The shipment forwarded on the s.s. *Kalomo* was consigned by us to a neutral port, Rotterdam; shipment in question is our property until it has been delivered to the consignee at Rotterdam. It was forwarded prior to the declaration of the present war between Germany and England. It consists of stock that is only used by a very few factories in Europe.

The certificate of insurance stated that in case of loss

. . . such loss is payable to the order of J. F. Muller & Sohn on surrender of this certificate.

The original certificate of insurance contained an endorsement by Luschka & Wagenmann, though the document produced to the Procurator-General did not. There was no explanation offered of the fact that the bill of lading was endorsed to Luschka & Wagenmann, and he contended that, as in the case of the previous consignment,

this consignment was sold to that firm. In the correspondence it was suggested that the Rotterdam purchaser had refused to take up the documents—documents which were obviously in German hands.

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The PRESIDENT : How came the first claim to be made ?

The SOLICITOR-GENERAL said that it was made in an earlier affidavit by Mr. Le Sueur, who stated that the goods were shipped by John B. Ransom & Co., and that

. . . the title to this lumber remains vested in John B. Ransom & Co. until delivery has been made to J. F. Muller & Sohn at Rotterdam, Holland.

The PRESIDENT : He does not say that Messrs. Muller & Sohn were agents for sale.

The SOLICITOR-GENERAL said that it looked, from the affidavits, as if there was a sale to Muller & Sohn, of Rotterdam. He did not wish to suggest dishonesty on the part of the claimants. It might be that Muller & Sohn, of Hamburg, said that they had sold the goods at Rotterdam, but when they were asked for details of the contract and customers the information was not forthcoming. All the Court knew was that Muller & Sohn had sold the parcel of lumber to a German firm, and that they wanted another consignment to satisfy the requirement of their customers. They were sent the bill of lading and drafts, and on the bill of lading appeared an endorsement by Luschka & Wagenmann, the very people who bought the previous consignment. He submitted that the claim put forward was unsupported in any way, and such documents as had been produced were quite inconsistent with the claim. Even assuming the existence of a Rotterdam purchaser, there still remained the drafts, and the property, in any case, would not be in the claimants.

Mr. C. ROBERTSON DUNLOP (for Messrs. J. B. Ransom & Co.) said his point was that the property remained in



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Messrs. Ransom & Co. The goods were shipped before the war, but there was no presumption that the goods passed from the shippers to anybody on the Continent.

The PRESIDENT : In what capacity was the bill of lading endorsed by Luschka & Wagenmann ?

Mr. DUNLOP said the shippers were unable to give any explanation of what took place in Hamburg and Rotterdam in connection with these documents. He understood that Messrs. Muller & Sohn were the *del credere* agents of the shippers. These goods were no doubt shipped for the purpose of being sold ; but there was no evidence, on the materials before the Court or in the possession of the claimants, from which the inference could be drawn that the goods had been sold, nor as to the terms under which the property had passed to the buyers. All that was known was that Messrs. Muller & Sohn's buyers refused to take up the contract.

The PRESIDENT : Where is the evidence that they refused to take up the documents ?

Mr. DUNLOP : There is a letter of Messrs. Muller & Sohn in which they say :

Our Rotterdam customers refused to take up the documents.

If that be true, it would follow that the property has not passed.

The PRESIDENT asked if there was any contemporaneous document which showed that Messrs. Muller were agents paid by commission.

Mr. DUNLOP replied in the affirmative, saying that the only interest that Messrs. Muller had was their commission. The documents having been sent to Messrs. Muller, they accepted drafts on the goods to the extent of 80 per

cent., that being a balance due to them on a previous transaction. The payment by Messrs. Muller of this amount would not, however, in any way divert the property from the sellers, though Messrs. Muller might possibly have a lien on the bill of lading to the extent of their advance. His contention was that some arrangement was made for the goods to be left with Messrs. Luschka & Wagenmann, of Mannheim, who had facilities for storing timber, by which they were to store the timber pending a settlement of the dispute between Messrs. Muller and the buyers in Rotterdam. There was no evidence that Messrs. Luschka & Wagenmann were buyers. A letter written by the claimants to their agents in this country stated :

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There is no reason in the world for the suggestion that it seems more than likely that the goods were for German buyers. The goods were sent to Messrs. Muller at Rotterdam as agents.

The PRESIDENT : That is consistent with the belief that the goods had been sold. If they were sold, why do not Messrs. Muller tell us to whom they were sold ?

Mr. DUNLOP : They have no interest in this case except as agents.

The PRESIDENT : But they paid the draft.

Mr. DUNLOP : That is so, but the payment was allocated to debts relating to previous transactions.

The PRESIDENT : What has happened is that you have received payments on the draft which represent 80 per cent. of the value of the goods.

Mr. DUNLOP said that was the case, but it was made as an allocation in relation to previous transactions.



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The PRESIDENT: You want the whole of the goods, namely, 100 per cent., and you have got 80 per cent. already. So what you want is 180 per cent. of the value.

Mr. DUNLOP said that, as a matter of fact, his clients had not received the 80 per cent. He read another letter sent by Messrs. Ransom & Co. to their agents in England, which stated :

As far as Messrs. Ransom are concerned, they never knew the destiny of the shipment to Rotterdam, and Messrs. Ransom have still every reason to believe that the cargo was sold to a Rotterdam merchant.

Another letter from the claimants said :

We have given all the information possible with regard to this shipment. The only interest Messrs. Muller had in this cargo was as agents.

Mr. DUNLOP then called Mr. OWEN PERCY, manager of Messrs. Cobbett & Co., of London, who said that his firm had acted as agents to Messrs. Ransom & Co., of Tennessee. He had seen the endorsement on the bill of lading for these goods by Messrs. Luschka & Wagenmann. He believed that it did not necessarily mean that they intended to buy.

The PRESIDENT: Do you not think that they endorsed the bill of lading because the goods were sold to them?—I believe they might endorse the bill of lading, although they were only going to store the goods.

Do you suggest that Messrs. Luschka & Wagenmann have ever stored goods of this kind that they have not paid for?—They have suggested doing so.

Mr. DUNLOP: Suppose Messrs. Muller had sold to buyers in Rotterdam, and the buyers in Rotterdam had refused to take up the document; as a matter of business,

what then would Messrs. Muller have done?—They would arrange to have the goods stored.

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Do you know that Messrs. Luschka & Wagenmann have storing facilities?—They have a big timber yard.

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The PRESIDENT: As a matter of business, do you not think that Messrs. Muller would have explained what they had done?—Yes.

Mr. DUNLOP said it was usual for the *del credere* agent to pay a portion of the price as an advance, but not the whole of the price.

The SOLICITOR-GENERAL (cross-examining): Have you yourself ever stored timber with a timber merchant?—Yes.

Is there ever an endorsement on a bill of lading by the storer relating to timber in such a case?—That I do not know. It entirely depends on the circumstances.

### JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*): The claimants are Messrs. J. B. Ransom & Co., the original shippers of the goods which were sent to order to Rotterdam. They claim the property as having remained in them.

The case for the Crown is that the property had been sold by Messrs. Muller & Sohn, of Hamburg, before it was seized. It transpires that Messrs. Ransom had actually received, by payment of the draft by Messrs. Muller, 80 per cent. of the value of this property. It is, therefore, a little bold for them to come forward here and say that, in addition to the 80 per cent. already received, they are entitled to the property itself. I have already said that they ask



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for 180 per cent. of the value of this property. It may be that they have lost the 20 per cent. for the time being, but for that amount they may have a claim at some time or other against the German agents whom they trusted.

There has been ample opportunity of explaining what was done with the property. In the letters of Messrs. Muller they talked about "our customers" and "our buyers," and in the certificate accompanying one of the letters they talked about "our Rotterdam customers." Who their customers were in Rotterdam, and who the buyers in Germany were, they have not told us. It is perfectly clear that whoever is entitled to this property, Messrs. Ransom are not. The property passed from them either to persons in Rotterdam or Germany. Their claim is, therefore, disallowed.

The Crown has nevertheless to satisfy me reasonably that the goods are enemy goods.

In the first place, no claimant has come forward here on the part of any neutral buyers, or any alleged neutral buyers. If the goods were, in fact, sold to a neutral at Rotterdam, nothing would have been easier than for Messrs. Muller, of Hamburg, to have said so; because if they had in fact been sold to neutrals the case would have been clear. There is no such claim by a neutral.

What, therefore, is the proper conclusion to come to from these facts? I have the documents before me, and there is abundant justification (in the absence of proper explanation by Messrs. Muller) for the conclusion that the buyers of this property were at one time Messrs. Luschka & Wagenmann. Whether or not they sold to anybody else I do not know. They were the endorsers of the bill of lading, and were also the endorsers of the certificate of insurance of these very goods. They were buyers of goods of this description, because there was a previous contract to sell timber to them. Although no contract for the sale of this

particular cargo has been produced, I am satisfied, in the circumstances, that these goods were sold by Messrs. Muller to the German firm.

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My judgment, therefore, is that these goods were enemy property, and the decree of the Court is that they should be condemned as prize.

Mr. DUNLOP asked that he should be allowed to deposit the usual sum of £250 into Court, with the view to appeal.

The SOLICITOR-GENERAL suggested that in a case such as this the deposit should be £300.

The PRESIDENT fixed the amount to be paid into Court at £250.

Mr. DUNLOP said that he also appeared on behalf of the Gans Steamship Line for payment of freight, but he did not know whether his Lordship would deal with the freight in this particular case, as there were many parcels.

The SOLICITOR-GENERAL said a great number of parcels had been released, but he asked for the condemnation of the goods contained in Nos. 7, 8, 9, 10, 13, 14, 18, and 21, about which there was no longer any dispute.

The PRESIDENT condemned the whole of the goods enumerated in the numbers mentioned by the Solicitor-General.

Mr. DUNLOP said the steamship was British, and was diverted by the Admiralty to London while on the way to Rotterdam. She had on board a very large portion of the cargo consigned to Rotterdam, since released by the Procurator-General. There was a point in this case slightly different from that involved in the judgment of his Lordship in the case of the *Juno*.\* It was a question

\* (1914), ante, Vol. I., 177, at page 184.



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whether special charges ought to be distributed over the whole of the cargo.

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The PRESIDENT: The first question is whether the claimants are entitled to any freight; but this can be referred to the Registrar, who is empowered to deal with the whole of the circumstances. The question of the amount, if any, to be allowed is also referred to the Registrar, who will take into consideration all the circumstances; and in the event of any point arising upon either of the questions it can be referred to the Court.

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#### COUNSEL

For the Crown	...	...	<i>The Solicitor-General.</i>
			<i>R. H. Balloch.</i>
For the Claimants	..	...	<i>C. Robertson Dunlop.</i>

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#### SOLICITORS

For the Crown	...	...	<i>The Treasury Solicitor</i>
			<i>for the Procurator-General.</i>
For the Claimants	...	...	<i>Trinder, Capron &amp; Co.</i>

Dutch Steamship  
**“KATWIJK.”** 2040 Tons.  
 (Cargo *Ex.*)

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*Owners:* Erhardt & Dekkers, Rotterdam.

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This case is also reported

**31 T. L. R.** 448.                      **1 Trehern,** 282.  
**[1916] P.** 177.

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*Conditional Contraband Cargo—Declaration of London, 1909—  
 Iron Ore—Proclamation of September 21, 1914—Neutral Vessel—  
 Condemnation of Cargo—Shipowners' Claim to Freight and  
 Demurrage—Freight allowed—Demurrage disallowed.*

The Crown claimed condemnation of a cargo of iron ore consigned by neutrals from a neutral port to neutrals at a neutral port, but in fact destined for the Krupp works, at Essen. The ore at the time of shipment was not contraband. On September 21, 1914, it was made conditional contraband by Royal Proclamation. The *Katwijk*, a Dutch ship, was stopped in the Channel and sent in to Ryde Roads. Later both ship and cargo were seized as prize. The ship was released and the cargo was sold. No claim was made to the cargo in the Prize Court. It was condemned.

The shipowners claimed freight and demurrage. The Court allowed the former and disallowed the latter.

The ATTORNEY-GENERAL (*The Right Hon. Sir John Allsebrook Simon, K.C.V.O., K.C., M.P.*) : My Lord, this case was before your Lordship on February 15, when the Crown applied for the condemnation of the cargo of 3,350 tons of iron ore on board this vessel. Your Lordship thought the case might raise some rather large and general

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 —  
 Before the  
 Right Hon.  
 Sir Samuel  
 Evans,  
 President of  
 the Probate,  
 Divorce, and  
 Admiralty  
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questions, and it stood over with a view to its being more fully presented. I will just state two or three facts and dates, and then your Lordship will see how far the general questions will arise.

The *Katwijk* is a Dutch ship—a neutral ship—belonging to, I think, Rotterdam people, and she is certainly registered as a Dutch ship. She sailed on September 16—therefore, after the outbreak of war—from a port in the north of Spain called Dicide. She was laden with a cargo of 3,350 tons of iron ore. The Crown allege—and I do not think it is going to be disputed—that that iron ore was destined for the Krupp works at Essen. It certainly is a fact that nobody appears to claim this cargo at all. Under the bills of lading the cargo was deliverable at Rotterdam to Ruys & Co., or order.

The bill of lading is exhibited to an affidavit sworn by the Officer of Customs, and is dated September 16, 1914 :

Shipped in good order and condition by Compañia Minera de Dicide in and upon the good screw steamship *Katwijk* . . . lying in the Port of Castro Urdiales Dicide, and bound for Rotterdam.

then it is to be delivered to Ruys & Co., or their assigns.

Ruys & Co. are a Dutch firm, and for this purpose agents for Krupps, I think. The ship sailed on September 16, the date of that bill of lading, and the charter-party was dated September 10, six days before. When she got into the Channel, somewhere by St. Catherine's Point in the Isle of Wight, she was ordered into port on September 19, information having reached the authorities here. She first went to Portsmouth, or somewhere close by, and on a subsequent date she was sent round to Middlesbrough, where she discharged her cargo. On October 4 the cargo was seized as prize. The ship was released very shortly afterwards. However, I do not want

to obscure the point for what it is worth. In the affidavit of Mr. Saunders, which your Lordship will find sworn on October 5, 1914, he states that he is the Collector of Customs at Portsmouth. Paragraph 2 reads :

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The above mentioned ship together with the cargo therein was seized as prize by me to the use of His Majesty in the said port on the 4th day of October, 1914.

The date is of some little importance. There was a further affidavit of Mr. Saunders of January 19, 1915. That is of importance. He says that he is an officer of Customs and Excise of the Customs House, Portsmouth, and continues :

On the 25th September last I received a telephone message from the Naval Authorities at Culver Cliff stating that the steamers *Katwijk* and *Chester* were being sent to Ryde Roads, Portsmouth, for examination on the 26th.

The dates are of importance, because on September 21 an Order in Council was made, to which I shall have to make reference, which declared that this iron ore would be conditional contraband. Something turns therefore on which side of September 21 one gets. The ship starts on the 16th—that is quite undoubted—and I do not at all dispute that she was stopped in the Channel on the 19th. It appears on the 25th Mr. Saunders received a message from the Naval Authorities

. . . stating that the steamers *Katwijk* and *Chester* were being sent to Ryde Roads, Portsmouth, for examination on the 26th. I proceeded to the vessel, examined papers and cargoes, and wired particulars of examination to London. On the same date I received a wire from the Secretary to detain s.s. *Katwijk* pending further instructions. The same evening I reported what I had done, and on the 3rd October, 1914, a telegram was received: "14009 S.C. *Chester* and *Katwijk* both ships and cargoes are to be handed over to the Prize Court.—Secretary, Customs."

I immediately took the necessary action to seize the vessel, and reported my proceedings on the 6th October,



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1914, and the vessel remained in my charge until she proceeded to Middlesbro' by order of the Admiralty Marshal by telegram dated 17th October, 1914.

That makes it quite plain, therefore, that when he says the 4th—the 4th is the date when he seized—he is not saying anything which is inconsistent with what the other side allege. The ship was detained, stopped in the Channel, and sent in for examination apparently earlier, but even then the message is on the 25th, and the actual seizure takes place on the 3rd or 4th. So far as the ship is concerned, there is no application to condemn the ship. It is a neutral ship and it has gone away. There may be a question as to whether the owners of the ship are entitled to anything by way of demurrage. That question your Lordship will, if necessary, deal with, and deal with separately.

The PRESIDENT : That depends on what is done with the cargo.

The ATTORNEY-GENERAL : To a certain extent it might, and also on how far they knew that the cargo was intended for the enemy. I am here alleging that that cargo is contraband, and there is no one to deny what I say.

The PRESIDENT : I see Mr. Dunlop is busy—whom are you for, Mr. Dunlop ?

Mr. DUNLOP : I appear for the owners of the ship, and they claim for demurrage.

The PRESIDENT : Nobody claims cargo ?

The ATTORNEY-GENERAL : Nobody claims the cargo.

The PRESIDENT : I thought some question was raised as to whether property could be seized as contraband when it is only declared contraband after the ship began to sail.

The ATTORNEY-GENERAL : Quite, and I thought it would be convenient, as your Lordship suggested this opportunity, just to go through what is relevant with regard to this, though I am quite aware that it only indirectly affects my learned friend, Mr. Dunlop, and I may reserve so far the claim of the ship. One may put the thing in three stages. The Declaration of London is itself a document which is not binding on the different great nations of the world, neither on this nation nor on any other. Of course at the beginning of the war the matter was absolutely at large—and though it has been the practice, at any rate in modern times, for a State which has become belligerent to give public notice of the practice which it proposes to follow and the claims which it proposes to make, that is not because there is any rule that it must do so. It is done as a matter of international probity and convenience, and the State may be in a position to announce at the beginning of the war that it does not propose to insist upon its full rights as a belligerent, when it is obviously convenient that a neutral ship should know that that is so.

On the other hand, there is no universal or general agreement as to what is contraband and what is not, and as there are many other points on which practice varies, it is obviously convenient that the belligerent should announce what it intends to do. I am very far from saying that the fact that the belligerent intends to do so, *ipso facto*, alters the whole law of Prize as known in the Prize Court. I do not seek to ask your Lordship to recognize that position—I do not seek to put it upon you at all—but when you are dealing with matters which are in doubt—I mean as to which the practice of different nations may differ (even the practice of the same nation may differ from time to time)—when the belligerent gives public notice that it proposes to follow a certain course, one of the duties

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of the Prize Court is to see that it does what it says. It is one of the reasons for establishing a Prize Court, that the Executive may be supervised and that it may be compelled to make representations good, as I may call it, and not to blow hot and cold about a particular matter. If there had been no Order in Council at all, then we should have had this matter quite at large. I suppose that it would have been legitimate for the Crown to claim that such and such an article was contraband in such and such a case, and then your Lordship would have decided it by what I may call the common law of the Prize Court. That is the first stage.

What in fact happened was this : It was thought convenient—it is not a question of the Declaration of London being in itself a binding treaty (it is nothing of the kind)—to give public intimation as to the course which this country would be prepared on its part to follow, and the rules which it would be prepared to submit to. That was the Proclamation of August 20, which is printed at page 143 of the *Manual of Emergency Legislation*. There you have this, what I call the second stage. On August 20, 1914, the recitals become important :

Whereas during the present hostilities the Naval Forces of His Majesty will co-operate with the French and Russian Naval Forces, and

Whereas it is desirable that the naval operations of the allied forces so far as they affect neutral ships and commerce should be conducted on similar principles, and

Whereas the Governments of France and Russia have informed His Majesty's Government that during the present hostilities it is their intention to act in accordance with the provisions of the Convention known as the Declaration of London, signed on the 26th day of February, 1909, so far as may be practicable.

Your Lordship sees those words. It does not do to strain these announcements with pedantic pressure. Then :

Now, therefore, His Majesty, by and with the advice of His Privy Council, is pleased to order, and it is hereby ordered, that during the present hostilities the Convention known as the Declaration of London shall, subject to the following additions and modifications, be adopted and put in force by His Majesty's Government as if the same had been ratified by His Majesty.

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Then follow the additions; and it is necessary to see what they are.

(1) The lists of absolute and conditional contraband contained in the Proclamation dated August 4th, 1914, shall be substituted for the lists contained in Articles 22 and 24 of the said Declaration.

(2) A neutral vessel which succeeded in carrying contraband to the enemy with false papers may be detained for having carried such contraband if she is encountered before she has completed her return voyage.

Your Lordship knows that under the scheme in the Declaration that would not have been so.

(3) The destination referred to in Article 33 that is the destination of conditional contraband—

may be inferred from any sufficient evidence, and (in addition to the presumption laid down in Article 34)

which deals with presumptions arising in connection with Article 33—

shall be presumed to exist if the goods are consigned to or for an agent of the Enemy State or to or for a merchant or other person under the control of the authorities of the Enemy State.

The fourth paragraph deals with blockade, and we need not trouble with that. Then

(5) Notwithstanding the provisions of Article 35 of the said Declaration,

that is, the provision saying that in certain circumstances



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conditional contraband is not liable to capture unless it is found on board the vessels of the enemy—

conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture to whatever port the vessel is bound and at whatever port the cargo is to be discharged.

That has often been referred to, and it is a convenient expression as insisting upon the application in case of need of the doctrine of continuous voyage in the case of conditional contraband. I am not concerned with the precise scope of these stages, but the point is that in the second stage you have the announcement by the British Government that they were not compelled by any treaty obligations to observe the rules which have been notified in the Declaration of London, but as far as practicable they are prepared to do so. It is to the benefit of neutral ships and commerce that this should be known, but they give notice at once that at any rate there must be these exceptions.

Then there follows on September 21 the beginning of the third stage, and that your Lordship will find in the Proclamation on page 111 of the *Manual of Emergency Legislation*. It is rather odd that it should be in an earlier page in the book, but it is, and it cannot be fairly applied unless one reads it in the order in which I am taking it. On September 21, 1914, there is this, and again the recitals become important :

Whereas on the fourth day of August last We did issue Our Royal Proclamation specifying the articles which it was Our intention to treat as Contraband of War during the War between Us and the German Emperor :

And whereas on the twelfth day of August last We did by Our Royal Proclamation of that date extend Our Proclamation afore-mentioned to the War between Us and the Emperor of Austria, King of Hungary :

And whereas by an Order in Council of the twentieth day of August, 1914, it was ordered that during the present

hostilities the Convention known as the Declaration of London should, subject to certain additions and modifications therein specified, be adopted and put in force as if the same had been ratified by Us :

And whereas it is desirable to add to the list of articles to be treated as Contraband of War during the present War :

And whereas it is expedient to introduce certain further modifications in the Declaration of London as adopted and put in force :

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Then follows, as your Lordship knows, the schedule of articles which are to be conditional contraband, among which you have at that time both hæmatite iron ore and magnetic iron ore. One of those has since been removed, but at the time we are speaking of, iron ore of either sort would be conditional contraband. Now the first question is, what is to be the effect of the Proclamation of August 4 taken in conjunction with the Proclamation of September 21 ? And when that is arrived at, how does that apply to this case ? Now the importance of it is that there was, as your Lordship knows well, a schedule to the Declaration of London which sets out what is called a list of free goods. It is quite obvious, I submit, that in so far as these Orders in Council put an article in the list of contraband it follows necessarily—since they have to be construed together—that *pro tanto* they modify the free list. If you look at Article 28 of the Declaration of London, one of the things which according to that Article may not be declared contraband of war—it is No. 6—was metallic ores.

For my purpose it may be that your Lordship will think it right to say—and I shall not resist it if you do say—that if it had not been for the document of September 21 the British Government had in effect announced that they did not intend to treat metallic ores as contraband. But be that as it may, the document of September 21 takes these ores as iron ores, and puts them into the list of conditional contraband. It does that in



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the document by its last recital which I read just now at the bottom of page 111, and which says :

And whereas it is expedient to introduce certain further modifications in the Declaration of London as adopted and put in force ;

and therefore, as I submit, it necessarily picks out iron ore from the free list and puts it into the list of conditional contraband.

It all comes to this, that an article cannot be both in the free list and in the contraband list—that is a contradiction in terms. This document plainly puts it into the contraband list, *ergo*, it equally plainly takes it out of the free list.

The PRESIDENT : Yes ; the Crown can say that they are to be treated as contraband, and you say that that is a notice not only to neutrals and belligerents, but to the whole world ?

The ATTORNEY-GENERAL : I think it is more particularly intended as a notice to neutrals, because the neutral is entitled to know.

The PRESIDENT : Therefore this Court is bound by any Proclamations of that kind.

The ATTORNEY-GENERAL : Your Lordship, I apprehend, in discharging your jurisdiction, will see to it that the Crown should not promise neutrals one thing and then do something quite different, because your Lordship sits here to protect neutrals when they find themselves inconvenienced by the action of belligerents. That is one of the great functions and the great glories of the Prize Court. Therefore, I suppose, independently altogether of whether the Declaration of London is a binding document, if the Executive chooses to announce : " We are

prepared to be bound by the free list" it ought to be treated as bound by the free list, but I am pointing out that as from September 21 iron ore is not in the free list.

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That being so, it stands in this way : Nobody comes to claim the cargo. It has gone beyond all possible hope of redemption : it is as black as it can be painted. But here is Mr. Dunlop, representing the ship, and he says he is entitled to say : " My ship started on September 16, and since she started before you announced that the cargo she was taking on board was liable to seizure, she is in a better position "—so he will urge—" than if she started with the document of September 21 already in existence." And that is quite true. As a general proposition I should not dispute that a vessel that started before the date when a particular thing was made contraband, is entitled to favourable treatment of that kind. If I was seeking to condemn the vessel, that would be an extremely strong argument, but I am not seeking to condemn the vessel. The vessel was released ; I have no doubt she congratulated herself on being released, but I think that she would have been better where she was, because she has since been torpedoed by the Germans and sunk.

The Article which your Lordship should look at in this case is, with reference to the ship, Article 43, and inasmuch as it is not one which is excepted from the general notice of August 20, or affected by the further notice of September 21, for what it is worth it has to be looked at. Article 43 declares :

If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation ; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in Article 41.

There is no question here of condemning the vessel. As



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regards the costs and expenses, if you turn back to Article 41 you find this :

If a vessel carrying contraband is released, she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national prize court and the custody of the ship and cargo during the proceedings.

We are not seeking to make Mr. Dunlop pay that, and therefore that does not apply. Now, there remains the question as to what is to be done with this vessel in view of the fact that she started before the notice was out. My submission is that in the circumstances Mr. Dunlop's claim ought to fail. Your Lordship will consider what is to be urged for the ship when his turn comes ; but there is one fact which your Lordship must bear in mind which has a bearing on it. Would your Lordship look first at the claim of the steamship company, and then I will ask your Lordship to look at an affidavit which has been filed. I think before I come to the claim perhaps I will ask your Lordship to do this—will you look at the appearance ? It says appearance was first entered by Erhardt & Dekkers, steamship owners—the owners of the steamship *Katwijk*—and I want your Lordship to observe the name. They are the owners of the ship ; they are the people really on whose behalf Mr. Dunlop is appearing. They enter an appearance. I have got, following that, in my bundle the claim which they make. There are revised claims, and I suppose it is the amended one we have got.

The PRESIDENT : Claim dated November 26, signed by Messrs. Clarkson & Co. ; that is the claim.

The ATTORNEY-GENERAL : They want some extra freight for going round to Middlesbrough or, alternatively, for detention or delay, and the dates they give are from September 19 to October 19—that is one month—and then

a small sum for pilotage. I submit that the claim is wrong in saying, as it does in paragraph 1, in the second sentence, that the *Katwijk*, on September 19, was seized. As I have shown your Lordship, what really happened was that she was sent in for examination on September 25. The belligerent has a perfect right when a vessel is passing in shore to send that vessel in.

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The PRESIDENT: But if she is detained after she is examined, I have held here consistently, I think, that, although what has sometimes been called "formal seizure" does not take place until afterwards, the real seizure is the detention.

The ATTORNEY-GENERAL: It may be so; I know my learned friend the Solicitor-General and myself have had reason to consider it, and we respectfully accede to the reasonableness of that view. Then the claim goes on—if you look at paragraph 4—to say that she was to be paid 7s. per ton freight as per charter-party and a reasonable sum for being delayed.

The reason for treating this vessel not quite so indulgently as we otherwise would be glad to do was because it was a neutral vessel with an obvious knowledge of what it was about. Krupps, in order to get their iron from the north of Spain, sent it by this very line of steamers to Rotterdam, which is the regular port of discharge, in order for it to get to Essen.

Putting all the documents in the case together to which I have referred, is it not quite clear in the absence of some rebuttal, indeed conclusive, that those who are in substance the owners of this vessel are themselves acting throughout in connection with this vessel for Krupps? The question then comes to be if that is the case—if they or some member of their firm are the purchasers at Bilbao or are concerned with the matter at the Spanish end—if



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they own the ship, and if there is a course of dealing between Bilbao on the one hand and Rotterdam on the other with regard to iron for Krupps, and if the one or other of the partners is manager for Krupp's forwarding and shipment department, and if one partner is at Bilbao and the other is at Cologne, and if all are closely connected with German firms, is this a case in which the Court, in its discretion, will say to the ship : " We will not only release you, but we will order the Crown to pay you, in the form of demurrage, freight or what not, because you are brought in with iron ore on board " ? That is the question, and I should have submitted, in view of the special facts here, that this is really a case in which we were called upon to take the steps we did. There is one further fact.

The PRESIDENT : There is nothing in the Declaration of London, as modified and adopted, about freight, is there ?

The ATTORNEY-GENERAL : No, my Lord. As far as the Declaration of London is concerned, all that happens is this : The ship is entitled to be released—in this case she has been released—she cannot be asked to pay costs and expenses, and we did not ask her to pay costs and expenses. Generally speaking, it is quite right that you should make some sort of allowance for a ship that has started before the date of the Proclamation announcing the goods to be contraband.

All I have to say in this case is, that I do not assent to the view that in the case of this vessel—owned for all practical purposes by Messrs. Krupp, and carrying materials to Messrs. Krupp for the obvious purpose of being used as munitions of war by the enemy—there should be payment made to my learned friend. My learned friend may be able to put a different complexion on it, and your Lordship may think it right to decide the matter one way or another without assent from the Crown.

Mr. DUNLOP : If your Lordship pleases. The main fact in this case is the date of sailing. This is a Dutch ship, owned by the Dutch company whose name appears on the affidavit of the claimants, and she starts on her voyage on September 16.

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The PRESIDENT : You need not go over all the dates again. The fact is that she started on her voyage with this cargo on board before there was any declaration that the cargo was contraband.

Mr. DUNLOP : And on that fact only I submit to your Lordship that the ship could not be lawfully seized, because the material date—in order to ascertain whether the ship was carrying contraband or not—is the date on which she sails. She sails with a perfectly innocent cargo.

The PRESIDENT : When she sailed this cargo was not of a contraband nature.

Mr. DUNLOP : And, moreover, the British Government had issued an Order in Council on August 20 promising neutrals that ore would be free because they stated on two occasions they would adopt the Declaration of London and, therefore, Article 28. Therefore, I submit to your Lordship in those circumstances, having regard to the law, that it is quite immaterial whether these goods were consigned to Krupps or whether there was any connection at all between the managers of the steamship company and Messrs. Krupp. At the time these goods were shipped they were shipped on board a neutral ship, and unless they were contraband the parties were engaged in a perfectly legitimate trade.

At the date on which the ship was seized and ordered into port the cargo had not been declared contraband. The cargo was not declared contraband until September 21, and in order that the declaration of contraband should be



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effective it must, as your Lordship knows—under the Declaration of London—be notified to the neutral powers. But there was no notification to the Dutch Government which could affect the *Katwijk* after September 21, because she was then in possession of the Crown authorities here.

It is not suggested that there was any notification after September 21 which could possibly affect the *Katwijk*, which had already been seized. Therefore, from the first to the last she was perfectly innocent of carrying any illicit cargo, and, therefore, there is no ground for depriving her of her freight, even though, on the letters which the Attorney-General has read to your Lordship, there was some connection between the interests of the shippers of the cargo and the interests of Messrs. Krupp; because until it was declared contraband they were quite entitled to carry this cargo to Messrs. Krupp in Germany or to any other country. It was a perfectly legitimate freight. I submit that there are really no grounds on which your Lordship should deprive the ship here of the freight which she would have earned if the vessel had not been prevented from completing her voyage. I do not appreciate any grounds on which payment of freight can be refused. If the ship had been guilty, the proper course was to proceed against the ship for condemnation. That course has not been taken. The Crown appreciated that the ship was innocent; if the ship was innocent, she ought to get the benefit of that innocence, and recover the freight as if this cargo had not been seized by the Crown. The seizure of this cargo by the Crown is tantamount to a delivery of the cargo to the Government, and on these grounds I submit the ship ought to receive its freight.

If a vessel which leaves port with a cargo which is not contraband has no opportunity during the voyage before she is captured of delivering her cargo at any other destination, she is perfectly innocent throughout. The mere fact

that the Government subsequently think fit to declare ore contraband does not visit any penalty, I submit, on the ship, and make illegal that which was originally perfectly innocent and lawful.

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### JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*) : In this case the Crown seeks for a decree of condemnation of 3,350 tons of iron ore, which was a cargo laden upon the Dutch ship *Katwijk*, and which was seized in September, 1914. There has been some discussion as to when the cargo was seized. Nobody appears for the owners of the cargo. Nobody claims the cargo; but Counsel for the ship suggested that the seizure was before September 21. I decide, upon the affidavits which have been read by the Attorney-General, that the cargo was not seized before September 26. It is not necessary for me to go any further, and to declare whether it was in fact seized on September 26 or on October 4. If it was not seized until September 26, then by that date the Proclamation of September 21 had been issued, in which it was declared that iron ore would be regarded as contraband. It is, of course, within the power and function of the Crown to add to the list of contraband from time to time, and, pursuant to this undoubted power vested in the Crown, this Proclamation was issued on September 21. I, therefore, decree the condemnation of this cargo as contraband, seized after that Proclamation was issued. A claim has been put forward by the owners of the ship to the freight, and to other sums of money which they call demurrage or damages for detention. [Now, the ship belongs to a Dutch company. It is admitted that the ship sailed upon this voyage on September 16 carrying this cargo, which was then not



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contraband. Therefore, she started upon a perfectly innocent voyage. According to the principles which were agreed upon in the Declaration of London—principles upon which I think it would be right for this Court to act, apart from the binding character of the Declaration as adopted by Order in Council—the ship could not be condemned by reason of the cargo being declared contraband after the voyage began. *Prima facie*, therefore, the owners of this ship, the Dutch company, would be entitled to some freight. The Attorney-General, however, has pointed out to me certain facts with reference to the firm of Messrs. Erhardt & Dekkers, and with regard to the position of Mr. Dekkers himself, and their apparent relationship in business with Messrs. Krupp. Whatever their position was at the time when this voyage started with the intention to carry this cargo, I doubt not, to Messrs. Krupp—for the purpose of being converted into munitions of war—they do not seem to have been on very friendly terms with the German Government afterwards, because I am told that this ship, the *Katwijk*, has been subsequently torpedoed by one of the German warships. I do not know whether the officers of the warship knew or whether they cared that she was a ship belonging to Messrs. Erhardt & Dekkers, who had been in close business connection with Messrs. Krupp's firm. Now, is there enough before me to displace the *prima facie* claim which these people have as owners of the ship to the freight? It is to be observed that at this time there is no reason whatsoever why Messrs. Erhardt & Dekkers should not be engaged in business transactions with Messrs. Krupp, and should not make a profit out of them if they could; and I see no reason here for depriving the owners of the neutral vessel of such freight as ought, in all the circumstances of the case, to be given to them. The amount of freight will be decided upon reference to the Registrar and

merchants, and regard will be had to all the circumstances, as was pointed out in the case of the *Juno*.\*

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With regard to any further claim for demurrage or detention, I disallow it. This vessel, like other vessels, ran some risks. I have no doubt myself that if he considered at all, the master—or the charterers—might very well have said: "Well, we are starting on an innocent voyage now, but we wonder whether iron ore will be added to the list of contraband before reaching Rotterdam"—as in fact it was. Now, such detention as they were put to, such loss as occurred to them by reason of that detention, is part of the inconvenience and loss which, unfortunately, have to be suffered even by neutrals in the dire circumstances of war. I, therefore, disallow any claim except such claim for freight as ought reasonably to be allowed as before stated.

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\* (1914), ante, Vol. I. 177, at page 189.

#### COUNSEL

For the Crown	...	...	...	...	<i>The Attorney-General.</i>
					<i>Stuart Bevan.</i>
For the Claimants, the Shipowners	...				<i>C. Robertson Dunlop.</i>

#### SOLICITORS

For the Crown	...	...	...	...	<i>The Treasury Solicitor</i>
					<i>for the Procurator-General.</i>
For the Claimants	...	...	...	...	<i>Clarkson &amp; Co.</i>
					<i>as Agents for</i>
					<i>J. W. R. Punch &amp; Robson.</i>



## British Steamship

"IOLO." 3903 Tons.

(Cargo *Ex.*)(ALFRED H. JENKINS, *Master.*)

*Owners:* Iolo Morganwg S.S. Co., Ltd. (Evan Thomas Radcliffe & Co.), Cardiff.

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This case is also reported

**113 L. T.** 604.**31 T. L. R.** 474.**59 S. J.** 545.**1 Trehern,** 291.

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*British Ship—Shipment of Cargo before Outbreak of War—Shipment by Allies to German Alien Enemies—Destination Hamburg—Diversion during Voyage to Barry—Seizure of Cargo—Sale—Claim by Allied Subjects to Proceeds of Sale—Release to Allied Claimants—Shipowners' Claim to Freight—Common Law Rule as to Freight when Voyage not Completed—Prize Court Rule—Fair and Reasonable Freight in the Circumstances.*

This was a summons adjourned into Court for further argument. It dealt with the right of the Russian Bank for Foreign Trade to the proceeds of the sale of certain barley, shipped in a British ship, the *Iolo*, owned by the Iolo Morganwg S.S. Co., Ltd.

The cargo was shipped before the outbreak of war to Hamburg from the Russian port of Nicolaieff. The facts will be found to be fully stated in the judgment of the President, but, shortly put, the Russian Bank claimed that the barley which was seized as prize should not have been seized at all, and that as it had been afterwards released the Bank were entitled to the entire proceeds without any deduction for freight or charges.

The shipowners contended that they were entitled to freight and charges out of the proceeds, relying (*inter alia*) on a clause in the bill of lading, known as the "Blockade and Interdicted Port" clause.

Counsel for the Crown contended that if the shipowners were entitled to some freight, it should be calculated according to the principles laid down in the *Juno* (1914), ante, Vol. I., p. 177; also that the shipowners were not entitled to any detention charges or other expenses.

The Court ordered a reference to the Registrar and Merchants to ascertain the amount due for freight or charges. (See post, p. 351.)

Mr. R. A. WRIGHT (for the Russian Bank for Foreign Trade) : The *Iolo* is a British ship with a cargo of innocent goods for Hamburg. No freight is due under the common law of England. Upon the outbreak of war it became illegal for the shipowners to carry the goods to their port of destination. Shipowners are not entitled to freight except upon delivery of the goods at the port of destination—Hamburg. *Metcalf v. Britannia Ironworks Co.* (1877), 2 Q.B.D. 423; *St. Enoch Shipping Co., Ltd. v. Phosphate Mining Co.*, *Lloyd's List*, April 29, 1915; [1915] W.N. 197; *Ogden v. Graham* (1861), 1 B. & S. 773; Carver's *Carriage by Sea*, 5th Ed. s. 238. The *Teutonia* (1872), L.R. 4 P.C. 171 will not assist the Crown. Further, on this contract the cargo owners are entitled to the proceeds of the goods without deduction for freight.

Mr. A. A. ROCHE, K.C., and Mr. W. N. RAEBURN (for the shipowners) : The release of these goods was subject to an indemnity to pay freight.\* It is admitted that at common law no freight is payable unless the goods are carried to their port of destination. The Prize Court, however, will apply principles differing from those of the common law in proper cases. See the *Juno* (1914), ante, Vol. I., p. 177; the *Corsican Prince* (1915), ante, p. 198. In this case there was a blockade or interdict clause in the bill of lading as follows :

In case of blockade or interdict of the port of discharge, or if the entering of or discharging in the port shall be

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—  
Before the  
Right Hon.  
Sir Samuel  
Evans,  
President of  
the Probate,  
Divorce, and  
Admiralty  
Division.

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\* For the terms of the indemnity see the judgment of the President, *infra*.



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considered by the master unsafe by reason of war . . . the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods. . . .

Barry, where the *Iolo* landed her cargo on the advice of the Admiralty, was the "nearest safe and convenient port" to Hamburg. See the *Teutonia* (1872), L.R. 4 P.C. 171. See also *Waugh v. Morris* (1873), L.R. 8 Q.B. 202. (They also referred to *Sanday & Co. v. British & Foreign Marine Insurance Co.* [1915], 2 K.B. 781.)

Apart, however, from any rights of the shipowners under the bill of lading, the Marshal had paid some freight and had entered into engagements as to the residue. The claimant bank only received a release of the goods on the basis of their honouring these engagements of the Marshal through the machinery of the indemnity of November 19.

Mr. I. H. STRANGER (for the Crown) : The shipowners may be entitled to some freight, but not the full freight. The rule laid down in the *Juno* (1914), ante, Vol. I., p. 177, should be applied. The shipowners are not entitled to recover anything in respect of detention and expenses at Portishead.

Mr. R. A. WRIGHT (in reply) : This case is the same as the *St. Enoch* case I cited before. The shipowners treated the voyage as at an end and did not act under the blockade and interdict clause. It will be useful to refer to Mr. Justice Scrutton's judgment in *Arnhold, Karberg & Co. v. Blythe, Green, Jourdain & Co.* at p. 389 of [1915] 2 K.B. 379, in which he quotes from *Esposito v. Bowden* (1855) 7 E. & B. at p. 783. This judgment deals with the effect of the outbreak of war on contracts of affreightment.

## JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*) :  
The substantial question to be determined upon the application now before the Court is whether the Russian Bank for Foreign Trade is entitled to the whole of the proceeds of the sale of certain cargo, originally seized as prize, without any deduction in respect of freight or other charges claimed by the shipowners.

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The form in which the question comes before the Court can be disregarded in order to avoid unnecessary complication.

The s.s. *Iolo* is a British vessel.

It started before the war from the port of Nicolaieff upon a voyage to Hamburg, laden with various cargoes destined for Hamburg, and for German consignees.

Part of the cargo consisted of two parcels of barley, one of 30,280 poods and the other of 156,580 poods (making a total of 186,860 poods), which, or the proceeds of sale of which, were claimed in these proceedings by the said bank, hereinafter called "The Russian Bank."

The Russian Bank was a bank incorporated under the laws of the Empire of Russia, with its head office at Petrograd, and with branches elsewhere in the said empire, and in other European countries, including England, but not Germany or Austria.

While the ship was on her voyage war was declared.

The shipowners apprised the British Admiralty of her movements, and asked for instructions.

The Admiralty advised that the ship should proceed to Falmouth. This was communicated to the ship as she was passing Gibraltar. But before she reached the Lizard she was directed to proceed to Barry Dock, and arrived there on August 19 last. On her arrival there her cargo



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was seized as prize by the Customs authorities acting for the Procurator-General of the Crown.

On August 31 the writ in these prize proceedings was issued against the owners of the goods laden on the vessel, including the portion subsequently claimed by the Russian Bank.

On September 2, by the order of this Court, the Marshal was authorized to sell the cargo, and it was sold accordingly, and the proceeds of sale were paid into Court in these proceedings.

On September 4 an appearance was entered on behalf of the Russian Bank claiming as owners of the 186,860 poods.

The ship was directed by the Marshal to proceed from Barry to Portishead to discharge the cargo for delivery to the purchasers.

On October 7 the shipowners entered a caveat against the payment out of the proceeds of the sale without notice to them.

The object of entering the caveat was to secure payment of the freight and other expenses claimed by the shipowners.

Shortly after the seizure the Marshal had given the shipowners an undertaking in the following terms :

I undertake to pay your goodselves on completion of the discharge of the cargo, the amount of the ascertained freight and charges on the out-turn in the terms of the charter-party and bills of lading.

In accordance with this undertaking, the Marshal has already paid the shipowners £1,750 on account.

Later the shipowners delivered particulars of their claim in respect of the whole cargo, which, summarized, was as follows :

- (1) Freight as per charter-party, £2,118 6s. 9d. ;
- (2) Charges at Barry, £119 14s. 4d. ; and
- (3) Claim for detention or loss of time, £1,080.

Roughly speaking, rather more than half of this claim, if allowed, would fall upon the portion of the cargo claimed by the Russian Bank.

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After entering appearance in these proceedings, the Bank instituted an action in the King's Bench Division of the High Court asking for a declaration as to their rights. This action was subsequently abandoned, and I need not further advert to it.

Certain communications passed between the Russian Bank and the Procurator-General, the result of which was that the Procurator-General consented to release to the Bank the net proceeds of part of the cargo to which they laid claim, upon the Bank giving an indemnity in writing on or about November 19.

The document evidencing this arrangement was in the following terms :

In Prize.

S.S. *Iolo*.

WHEREAS the undermentioned goods have been seized as prize :

AND WHEREAS the Russian Bank for Foreign Trade claims to be entitled to the goods hereinafter described and has requested the Procurator-General to consent to an Order for the release to them of the said goods :

AND WHEREAS the Procurator-General is willing upon receiving the following indemnity (and subject to such other conditions (if any) as may have been arranged between the parties) to consent to such an Order :

Now in consideration of the Procurator-General agreeing to give such consent the said Russian Bank for Foreign Trade undertakes to indemnify the Procurator-General whether on his own behalf or on behalf of the Crown or on behalf of the Admiralty Marshal or of any Officer or official of the Crown or of the Prize Court or of any person acting under the authority or instructions of the same or of any one or more of them against all petitions (including petitions of right) claims proceedings actions or demands for or in respect or on account of the goods or any part thereof or any proceeds thereof or arising directly or indirectly out of or



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connected with the seizure, detention or release of the goods or any part thereof and against all costs damages and expenses in respect of the premises. And the Bank hereby undertake to refund to the Procurator-General any sum or sums of money which may hereafter be found to have been paid or may be paid for the said parcels or of any of them by an alien enemy.

Then followed a description of the goods by reference to the numbers of the bills of lading, and the numbers of the poods, amounting in all to 156,580 poods.

I assume that a similar indemnity was given in respect of the 30,280 poods; or at any rate that the same conditions applied to the release of the proceeds of this parcel.

Later in the proceedings, by consent of the Procurator-General, orders were made authorizing the Marshal to pay out to the solicitors for the Russian Bank the net proceeds of sale of the 30,280 and 156,580 poods of barley, less certain sums which were retained until the question of freight and expenses was decided.

Pursuant to such orders two sums of £2,500 and £11,000 (making £13,500) were paid to the Russian Bank out of the proceeds of the sale of the cargo, leaving in Court a sum of about £1,500 (the balance of the proceeds) until the questions now in dispute were determined.

It has been necessary to set out the above facts in order that the circumstances in which the Russian Bank make the present application may be understood.

Mr. Wright, counsel for the Bank, contended that the Bank were entitled to be paid out the balance of the proceeds of the sale of the barley in full, without any deduction for freight or any other charges.

The foundation of this contention was that in law the contract between the shipowners and the Bank as owners of cargo had come to an end, because the goods were not delivered in the port of Hamburg in accordance with the contract contained in the bill of lading; and that the

shipowners were not legally entitled to recover the freight or any part thereof, or to any lien therefor, or to any allowance in respect of it.

But before proceeding to say anything about the legal questions which were argued, I must point out that in the view I take of the facts there are difficulties in the way of the Bank's claim which appear to be insuperable.

In the first place, Mr. Wright assumed that his clients were in the position of absolute owners of the cargo entitled to say that the seizure was wrongful; and that their claim must be considered without any reference to the seizure as prize, or to the sale, or to the prize proceedings, or to the terms on which the consent to the release of the proceeds of the sale was given. The argument was directed as if the question was merely one between the Bank and the shipowners, and depended only upon the contract contained in the charter-party.

This same Bank were interested in a cargo shipped and seized in very similar circumstances in the case of the *Corsican Prince*,\* which came before this Court in February last; and I venture to repeat what I said in that case upon the question of release by the Crown as follows :

The Crown has full right to consent to the release of any ship or goods captured or seized, on any grounds that the Crown may see fit. Moreover, it does not by any means follow as a necessary consequence of the release that the goods were not properly seized as prize as the Crown's droits of Admiralty. In the present case, as the Empire of Russia is our Ally in the war, it does not require a very vivid imagination to conceive grounds for giving up to the Russian Bank the proceeds of the portion of the cargo claimed by them, quite other than an acknowledgment of wrongful seizure. And if it be thought material, it would be quite open to any one interested in these proceedings at any stage to allege, and to set out to prove, that the seizure of the cargo was lawful.

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\* (1915) ante, page 198.



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I will add that if it had been thought material in the interest of the Bank in the present case it would have been quite open to them to allege and to set out to prove, if they could, that the seizure of the cargo was unlawful, and that they were absolutely entitled according to Prize law to have the cargo released, with or without costs and expenses.

That task they did not undertake.

The course they were advised to take, and which they may have taken with much prudence, was to accept the release of the net proceeds of the sale of the goods upon the terms of the indemnity hereinbefore set out. These terms show clearly that the arrangement was a compromise, and that it was by no means admitted that the Russian Bank were entitled as of right to the cargo or its proceeds.

I need hardly say that, according to the rules and practice of this Court, the Marshal acted rightly when he undertook to pay to the shipowners the ascertained freight and charges, by which I think was meant the proper amount of freight and charges to be ascertained by a reference to the Registrar and merchants in accordance with the principles which have been laid down for that purpose.\* These payments have in part been made and will at the end be made in full out of the proceeds in Court; and are covered by the wide words of the indemnity.

Upon these facts I am of opinion that the Russian Bank are not entitled to be paid in full, but only to be paid the net proceeds after deduction of freight and expenses.

But lest my view of the result of the facts may be considered to be erroneous, and as the legal aspect of the case and of cases similar to it is of general importance, I will deal also with the law applicable to such cases. I can do

\* See the *Juno* (1914), ante, Vol. I. 177, at page 189.

this the more briefly because I have already had occasion to deal with the subject in some of its aspects in the *Juno* \* and the *Corsican Prince*. †

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The former case dealt with the freight claimed by owners of a British ship (in respect of goods which were laden upon her and which were condemned as prize) as against the captors, and the respective positions of British and neutral ships in relation to their rights to freight in such cases were compared.

In the latter case I considered the general question of the jurisdiction of the Prize Court to award freight to owners of British ships where the cargo was seized as prize, and where it or its proceeds had been released as in the present case.

In order to avoid repetition I would refer to the authorities cited in those two decisions. From them I deduced certain results and ventured to lay down the following propositions :

The Prize Courts have constantly dealt with claims for freight and damages where ships or cargoes have been captured or seized, not only as between captors and owners, but also as between owners of ships and owners of cargo; and have adjudicated upon such claims whether the ship or cargo had been released, and when both ship and cargo had been released; and apparently no action involving questions in similar cases was brought in any common law Court.

And this is obviously so for grounds solid in justice and convenient in practice, because the two Courts administer two different codes or systems of law. The Prize Court deals with claims in accordance with the law of nations, and upon equitable principles freed from contracts, which

\* (1914), ante, Vol. I., page 177.

† (1915), ante, page 198.



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almost always cease to have effect upon capture or seizure by reason of the non-performance or non-completion of the contract of affreightment; whereas common law Courts would only determine the consequences of the strict legal contractual obligations of the parties. The common law Courts would either give the claimants for freight the whole or nothing, according as to whether the contract of affreightment had been performed or not. But the Prize Court takes all the circumstances into consideration, and may award, as it has done in reported cases, the whole or a moiety of the freight, or a sum *pro rata itineris*; or it may discard the contract rate altogether even as a basis for assessment on calculation (*vide* the *Twilling Riget*\*) ; or it may withhold or diminish the sum by reason of misconduct, as, e.g., by resistance to search or spoliation or non-disclosure of papers. A passing reference was made in the judgment given in the *Juno*† to the case of *The Friends*‡ : it was not dealt with at length because, as was pointed out, that was a dispute between shipowners and cargo owners, and not between shipowners and captors, as was that of the *Juno*. That very circumstance renders the decision in *The Friends* of great importance in the consideration of the matter now before the Court. It is right, therefore, to refer to it more fully. It was the case of a British vessel which had been chartered to deliver a cargo at Lisbon. The ship had prosecuted her voyage to the entrance of the Tagus, when she was warned off by the blockading squadron. A gale of wind afterwards blew her out to sea and she was captured by a Spanish privateer, but was soon afterwards recaptured by a British cruiser and taken to Madeira, where the ship and cargo were sold by the recaptors to pay salvage. The ship and cargo were afterwards

\* (1804) 5 Ch. Rob. 82; 1 E.P.C. 430.

† (1914), ante, Vol. I. 177, at page 186.

‡ (1810) Edwards. 246; 2 E.P.C. 48.

decreed to be restored. The question the Court had to decide was what freight was due in the circumstances. On the part of the owner of the ship it was contended that the whole of the freight was due, as the ship had actually gone up to the mouth of the port to which she was destined. On the part of the owner of the cargo it was contended that no freight was due as the cargo was not delivered according to the terms of the charter-party. Referring to certain cases of American ships bound to France or Holland which were brought into this country under the prohibitory law, Lord Stowell said :

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In those cases the Court gave the master the full benefit of the freight, not by virtue of his contract, because, looking at the charter-party in the same point of view as the Courts of Common Law, it could not say that the delivery at a port in England was a specific performance of its terms. But there being no contract which applied to the existing state of facts, the Court found itself under an obligation to discover what was the relative equity between the parties. This Court sits no more than the Courts of Common Law do to make contracts between parties; but as a Court exercising an equitable jurisdiction, It considers itself bound to provide as well as It can for that relation of interests which has unexpectedly taken place under a state of facts out of the contemplation of the contracting parties in the course of the transaction.

And then he delivered himself as follows :

The present case is marked with peculiar misfortune, because here, after the ship had been stopped by the blockading force, she was blown out to sea, and being subsequently taken out of the hands of the master, she was carried by the recaptors to a distant port, and there sold, together with her cargo, at a great loss. In this case, therefore, loss is unavoidable, and the only question is, upon whom the weight of it shall fall; now if the incapacity of completing the voyage could be exclusively attributed to one of the parties, it would be proper that the loss should fall there; but the fact is, that the calamity is common to both, for both ship and cargo were equally affected by the blockade.



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The ship could not have entered the interdicted port in ballast, any more than the cargo could have entered it in any other vehicle. The loss arises from the common incapacity of the one and of the other; I think, therefore, that what equity would suggest is, that the loss should be divided; and under these circumstances I shall direct a moiety of the freight to be paid.

In the case which now falls for decision in this Court the cargo in question was seized as prize; it was subsequently sold, and its proceeds were paid into Court to be dealt with in the prize proceedings. I have pointed out that, according to the authorities and practice of the Court of Prize, the jurisdiction of the Court to deal with freight is not affected by the release of the cargo even if it had been released upon the decision of the Court that it had been wrongfully seized, which was not the case in relation to this cargo.

According to the common law the contract of affreightment came to an end immediately it became illegal, because of the war, to proceed to carry the goods to their German destination, and in a Court of common law no freight could be recovered under the contract which had so come to an end. An illustration of this is afforded by the recent Judgment of Rowlatt J. in *St. Enoch Shipping Co., Ltd. v. The Phosphate Mining Co.*,\* where the learned Judge decided that no freight could be recovered by the ship-owners for the carriage of cargoes of cotton, copper, phosphate, and wheat from South America which were destined for Hamburg, but which were diverted to Manchester. It must be noted in connection with this decision that, although the cargoes were in some way detained by the Customs authorities, no proceedings in prize were taken. The cargoes were given back as if they never had been interfered with by the Customs authorities, and the case was dealt with upon the footing that no seizure as

\* *Lloyd's List*, April 29, 1915; [1915] W.N. 197.

prize was ever effected. I may be allowed to point out that the decision in that case, although I doubt not it was given in accordance with the law of contract, might fairly be considered commercially as producing a hardship to the ship-owners. On the other hand, it is satisfactory to note that if my view of the doctrines to be applied in such cases when they come before the Prize Court is correct, a more even and equitable adjustment can be made which balances fairly the rights of the parties, where the contract which has been ended no longer regulates them. Upon the grounds on which my decision is based, it becomes unnecessary for me to decide the various questions which were argued upon the construction of the bill of lading, and the effect of the "blockade and interdicted port" clause.

In my judgment the application of the Russian Bank for payment of the proceeds in full without any deduction for freight or charges fails both upon the facts and in law; and I dismiss their summons with costs.

Counsel for the shipowners did not contend in these proceedings that they were entitled to the full freight as the contract freight. In one sense, it was not necessary upon this application to argue that point. But I do not apprehend that it is desired to argue it further. And so it may be convenient now to order that it be referred to the Registrar and merchants to ascertain the amount due for freight or charges in respect of all the cargoes, upon the principles laid down in the judgment of this Court in the *Juno*.†

Mr. WRIGHT: My Lord, on the question of the costs of this application —

The PRESIDENT: I decide this application against you, with costs. Leave to admit the appeal within two months. Amount of security £250.

† (1914). ante, Vol. I. 177. at page 189.

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## COUNSEL

## STEAMSHIP

“ Iolo.”

For the Crown                   ...                   ...                   ... *I. H. Stranger.*

For the Claimants (The Russian  
Bank for Foreign Trade) ... *R. A. Wright.*

For the Claimants (the Ship-					
owners)	...	...	...	...	<i>A. A. Roche, K.C.</i>
					<i>W. Norman Raeburn.</i>

## SOLICITORS

For the Crown                 ...          ...          ...      *The Treasury Solicitor*  
*for the Procurator-General.*

For the Claimants (The Russian Bank for Foreign Trade) ... *Coward & Hawksley, Sons & Chance.*

For the Claimants (the Ship-owners) .. .. . *Botterell & Roche.*

## Cargo *Ex* S.S. “IOLO.”

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It is thought that the following proceedings in a Prize Reference will be of value to practitioners in the future. The whole of the proceedings in the Reference are printed except the evidence.—ED.

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## RECORD ON OBJECTION TO REGISTRAR’S REPORT.

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Claim of the Iolo Morganwg Steamship Company, Limited,  
for Freight and other Expenses.

Claim of the Iolo Morganwg Steamship Company, Limited, of No. 4, Dock Chambers, in the City of Cardiff, the true and lawful owners of the above-named steamship *Iolo*, in respect of bill of lading freights and remuneration for services rendered at the request of the Admiralty Marshal in placing the said steamship under his directions for purposes of discharging at Barry and Portishead, and also all costs, losses, damages and expenses arising out of the seizure and detention of the said cargo by or at the instance of the Procurator-General.

STEAMSHIP  
“IOLO.”



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The PARTICULARS of the said claim are as follow :

				£	s.	d.	£	s.	d.
To bill of lading freight on delivered quantity of cargo—									
72.44	units	at	7/6	per	unit	...	27	3	4
3669.10	units	at	7/-	per	unit	...	1,284	3	8
1065.54	units	at	6/9	per	unit	...	359	12	5
957.41	units	at	6/7½	per	unit	...	317	2	10
313.55	units	at	6/6	per	unit	...	101	18	1
				<hr/>			2,090	0	4
To mat money on 5,663.6 d.w. tons									
(being intake quantity) at									
1	1-5d.	per	ton	...	...	...	28	6	5
							<hr/>		
							2,118	6	9
By cash received on account ...							1,750	0	0
							<hr/>		
							368	6	9
To claim for services rendered at									
the request of the Admiralty									
Marshal in placing the said									
steamship at his direction									
for purpose of discharging at									
Barry and at the afterwards									
substituted port of dis-									
charge, viz., Portishead.									
Port charges at Barry as									
follows :									
Dock	dues	...	...	...	...	...	67	5	6
Pilotage	...	...	...	...	...	...	9	6	8
Boating	...	...	...	...	...	...	2	2	0
Light	dues	...	...	...	...	...	20	1	2
Dock	pilotage	...	...	...	...	...	3	15	0
Riggers	...	...	...	...	...	...	1	10	0
				<hr/>			104	0	4
Bunkers used at Barry—33½ tons									
at	9/4½	...	...	...	...	...	15	14	0

£ s. d. STEAMSHIP  
"IOLO."

The estimated extra time used is as follows :

Actual time used from time of leaving Nicolaieff loading port until completion of discharge at Portishead (including 16½ days occupied at Barry) ... ..	50 days		
Normal passage Nicolaieff to Hamburg (original port of destination) ... ..	19 days		
Normal time discharging at Hamburg ... ..	4 days		
	—	23 days	
		—	
Excess time occupied ... ..	27 days		
27 days at £40 per day being a reasonable remuneration ...		1,080	0 0
E. & O. E.		£1,568	1 1

Dated this 30th day of January, 1915.

BOTTERELL & ROCHE,  
24, St. Mary Axe, E.C.,  
Agents for  
VAUGHAN & ROCHE,  
Cardiff,  
Claimants' Solicitors.

The GROUNDS of the said claim are :

1. The claimants are a duly incorporated British company.



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2. The goods in question were in July, 1914, shipped by various shippers at Nicolaieff for carriage in the said steamship *Iolo* to Hamburg and delivery there to various German consignees.

3. Each of the bills of lading in respect of the said cargo contained the following conditions :

In case of blockade or interdict of the port of discharge or if the entering of or discharging in the port shall be considered by the master unsafe by reason of war, disturbances, or ice, the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods—and the steamer's responsibility shall cease when the goods are so discharged into proper and safe keeping, the master giving immediate notice of the same to the consignees of the goods, so far as they can be ascertained.

And

The master or agent shall have a lien on the goods for freight and payments made, if any, or liabilities incurred in respect of any charges stipulated herein to be borne by the owners of the goods.

4. The said steamship *Iolo* on passing Gibraltar was directed by the British Admiralty to call at Falmouth, but before the said steamship reached the Lizard Head substituted directions were given by the British Admiralty to the said claimants to order her to Barry.

5. On the 18th August, 1914, the said steamship *Iolo* was off the Lizard Head whereupon she was under the said directions of the British Admiralty taken to Barry as being the nearest safe and convenient port for landing the said goods then appearing.

6. At that time an interdict of the port of discharge (Hamburg) existed and the entering of that port was considered by the master to be unsafe by reason of war dis-

turbances. In the circumstances stated the master became entitled to land the said goods at the nearest safe and convenient port at the expense and risk of the owners of the goods which safe and convenient port in the circumstances above stated appeared to be Barry.

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7. The said steamship *Iolo* arrived at Barry on the 19th August 1914, where the said cargo was seized by the Admiralty Marshal at the instance of the Procurator-General.

8. On the 23rd August, 1914, the Admiralty Marshal gave to Messrs. Evan Thomas Radcliffe & Co. the managers of the claimants' steamship *Iolo* and other ships a written undertaking to pay freight and charges in respect of (*inter alia*) the cargo per the steamship *Iolo*. The following is a copy of such undertaking :

Admiralty Marshal's Office,  
Royal Courts of Justice,  
London, W.C.  
23rd Aug., 1914.

Dear Sirs,

"LLANISHEN," "LLANBERIS" and "IOLO."

With regard to your enquiry of the 20th inst. respecting the above vessels, I beg to inform you I undertake to pay to your goodselves on the completion of the discharge of the cargo the amount of the ascertained freight and charges on the outturn, in the terms of the Charter-party and Bills of Lading. I am advising the Collector of Customs.

Yours faithfully,  
(Sgd.) D. H. W. YOUNG,  
For Marshal.

Messrs. Evan Thomas Radcliffe & Co.,  
4, Dock Chambers,  
Cardiff.

9. On the 31st August, 1914, the Prize proceedings herein were instituted by the Procurator-General and the



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"IOLo."

said claimants were on the 1st September, 1914, served with the writ herein.

10. Appearance to the said writ was on behalf of the said claimants entered on the 4th September, 1914.

11. The said steamship *Iolo* was kept by the Admiralty Marshal at Barry from the 19th August, 1914, to the 5th September, 1914, and on the 5th September, 1914, the said ship proceeded, again by direction of the Admiralty Marshal, to Portishead to discharge the cargo.

12. During the stay of the said steamship *Iolo* at Barry heavy dock dues and other port charges were incurred and paid by the claimants as appears by their Particulars of Claim. The claimants contend that these expenses were extra to the ordinary disbursements of the voyage and that they should be allowed therefor.

13. The said steamship *Iolo* arrived at Portishead on the 5th September, 1914, and the landing of the cargo was on the 7th September commenced and thereafter proceeded with under the directions of the Admiralty Marshal.

14. The landing of the said cargo at Portishead under the aforesaid directions was completed on the 17th September, 1914.

15. The charges for the actual landing of the said cargo at Portishead have not been paid by the said claimants who understand that same have been paid by the Admiralty Marshal. The claimants however incurred and have paid other port charges at Portishead, but they amount to no more than about what would have been expended in similar charges had the said steamship *Iolo* gone to her originally intended destination of Hamburg.

16. The said cargo appears to have been sold and the proceeds thereof received by the Admiralty Marshal.

17. The freight payable under the bills of lading in respect of the output at Portishead amounts to £2,118 6s. 9d. (inclusive of mat money) on account of which the Admiralty Marshal had (pursuant to his said undertaking) paid to the claimants £1,750. The claimants have not been paid the balance of £368 6s. 9d. and they claim the same as balance of the bill of lading freight.

18. The normal period (based upon the said claimants' previous experience) of making and completing a voyage by the said steamship *Iolo* from Nicolaieff to Hamburg and discharging there is 23 days in respect of a cargo similar to the one now in question. The time actually occupied in making and completing the voyage in question and discharging at Portishead in substitution for Barry was 50 days being an excess of 27 days over the normal period. The said claimants contend that the extra consumption of time was due to the said directions of the Admiralty Marshal to proceed to Barry and thence to Portishead and to discharge there, after seizure of the cargo, for the account of the Admiralty Marshal. It was well known that at the time in question those ports were extremely congested. The claimants say that the Admiralty Marshal in requiring the ship to proceed to and discharge at Barry and (in substitution) Portishead impliedly undertook to pay and ought to pay a reasonable remuneration for each day of extra time lost to the said steamship *Iolo* and the consequential loss of employment of the said ship which the claimants estimate at £40 per day (*i.e.*, her usual rate of demurrage) the ship having been sent to Barry and Portishead, notwithstanding the prospect of delay in discharging, in order to enhance the value of the cargo by



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receiving the benefit of the favourable market there prevailing.

19. The claimants have not been paid the expenses incurred by them.

BOTTERELL & ROCHE,  
Agents for  
VAUGHAN & ROCHE,  
Cardiff,  
Claimants' Solicitors.

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Affidavit of Mr. Henry Radcliffe, in support of the Claim by the Iolo Morganwg Steamship Company, Limited, the Owners of the Steamship "Iolo."

I, HENRY RADCLIFFE, of No. 4, Dock Chambers, in the City of Cardiff, ship owner and ship manager, make oath and say as follows :

1. I am a member of the firm of Evan Thomas Radcliffe & Co., of No. 4, Dock Chambers, Cardiff, aforesaid, and am a director of the Iolo Morganwg Steamship Company, Limited, of the same place.

2. The said firm of Evan Thomas Radcliffe & Co. are the managers of the steamship *Iolo*, which is owned by the claimants, the said Iolo Morganwg Steamship Company, Limited. The last-mentioned company is a limited liability company, registered under the English Companies Acts, and is subject to His Majesty the King. I am authorized by the claimants, the said Iolo Morganwg Steamship Company, Limited, to make this affidavit on their behalf.

3. The claim herein of the said Iolo Morganwg Steamship Company, Limited, amounting to £1,568 1s. 1d., for bill of lading freights and remuneration for services rendered at the request of the Admiralty Marshal in placing the said steamship under his directions for purposes of discharging at Barry and Portishead and also all costs, losses, damages and expenses arising out of the seizure and detention of the said cargo by or at the instance of the Procurator-General was prepared under my supervision and the grounds therefor as stated therein are within my personal knowledge, except those appearing to be founded upon information as to the truth of which information I verily believe.

4. The said claim is a true and just one and the several grounds stated therein upon which the said claimants seek to be protected by the honourable Court in respect of the said claim can be supported by proofs.

5. On behalf of the said claimants I respectfully submit to the honourable Court that the said claim herein of the said Iolo Morganwg Company, Limited, should be allowed against the proceeds of the prize or such other protection should be granted to the said claimants as may seem to this honourable Court to be proper in the circumstances.

Sworn at Bute Docks, in the  
City of Cardiff, this 29th } (Sd.) HENRY RADCLIFFE.  
day of January, 1915.

Before me,

(Sd.) SELWYN BIGGS,

A Commissioner for Oaths.

Filed on behalf of the claimants, the

IOLO MORGANWVG STEAMSHIP COMPANY, LIMITED.



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Affidavit of R. A. Merz, Esq., in support of Application by the Russian Bank for Foreign Trade for Payment Out.

RUSSIAN BANK FOR FOREIGN TRADE, CLAIMANTS.

I, RICHARD ARTHUR MERZ, of 61 & 62, Gracechurch Street, in the City of London, manager of the Produce Department of the London Branch of the Russian Bank for Foreign Trade, of the same address, make oath and say as follows :

1. The Russian Bank for Foreign Trade (hereinafter called the " Russian Bank ") is a Russian Bank duly incorporated under the laws of the Empire of Russia, with its head office at Petrograd, in the said Empire, and with branches elsewhere in the said Empire, and with branches in other European countries, including England, but not Germany or Austria.

2. I am authorized to make this affidavit on behalf of the Russian Bank, and such affidavit is made by me to the best of my knowledge, information and belief, and from information and documents received by the Russian Bank.

3. The subject matter of the present claim arises in respect of two parcels of barley, one for 30,280 poods, lately laden on board the steamship *Iolo*, at Nicolaieff, under bills of lading Nos. 28/32 (hereinafter referred to as the smaller parcel) and the other for 156,580 poods, lately laden on the same vessel, at Nicolaieff, aforesaid, under bills of lading Nos. 5/7, 16/25, 34/40, 52/58 (hereinafter referred to as the larger parcel). The bills of lading are all dated July, 1914, and the goods were all destined for Hamburg, to which port the vessel was at the time of shipment about to proceed on her voyage.

4. At some date prior to the 31st August, 1914, the said parcels (*inter alia*) were seized by the officers of His Majesty's Customs at the Port of Cardiff.

5. On the 31st August, 1914, a writ was issued asking for confiscation of the said parcels (*inter alia*) as prize laden on this vessel.

6. The said parcels (*inter alia*) I verily believe were subsequently sold by the Marshal and the proceeds thereof paid into Court.

7. On or about the 19th November, 1914, the Procurator-General released on indemnity to the Russian Bank the net proceeds of sale of the smaller parcel.

8. On the 25th January, 1915, upon an application to this honourable Court by the Russian Bank for the removal of the caveat lodged by the owners of the steamship *Iolo* for payment out of the proceeds of the smaller parcel, an order was made that the Marshal should pay out to Messrs. Coward & Hawksley, Sons & Chance, the solicitors to the Russian Bank, the net proceeds of sale of the smaller parcel less £500 to be retained in Court pending the decision of an action brought by the Russian Bank against the owners of the steamship *Iolo* in the Commercial Court.

9. On the 5th February, 1915, the accountant in the Admiralty Marshal's Office under cover of a letter of that date addressed to Messrs. Coward & Hawksley, Sons & Chance, sent an order for £2,500 in respect of the smaller parcel, stating the same to be the net proceeds of sale so far as he was able to ascertain them less £500 retained pending the decision in the commercial action. The said action in the Commercial Court was discontinued in consequence of the judgment delivered by this honourable



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"IOLO."

Court in the case of the steamship *Corsican Prince* on the 22nd day of February, 1915.

10. The Procurator-General on the 28th January, 1915, released the larger parcel to the Russian Bank, or the net proceeds of sale thereof on indemnity, and it was afterwards arranged between the respective solicitors to the shipowners and to the Russian Bank that in respect of the larger parcel the shipowners would release their caveat subject to the sum of £1,000 being left in Court.

11. On the 15th February, 1915, the Admiralty Marshal under cover of a letter of that date addressed to Messrs. Coward & Hawksley, Sons & Chance, sent an order for £11,000 in respect of the larger parcel, stating the same to be the approximate net proceeds of the larger parcel less £1,000.

12. The total number of units of freight contained in the two parcels aforesaid is 3,266.8597, one unit for the purpose of freight on barley being 2,050 lbs.

Freight is payable on the actual number of units delivered and not on the quantities specified in the bills of lading. Had the bills of lading quantities been delivered the freight payable would have amounted to £1,118 19s. 2d., made up as follows :

Under bills of lading—

28/32	on .30,280	poods at 6/9	per unit.
34/38	on .31,500	poods at 6/9	per unit.
5/7, 16/25, 39/40 & 55	} on .97,810 poods at 7/- per unit.		
56/58	on .18,180	poods at 6/6	per unit.
52/54	on . 9,090	poods at 6/7½	per unit.

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186,860

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I have had great experience in dealing with cargoes of this nature and on discharge there is usually a shortage of between  $\frac{1}{2}$  per cent. and 1 per cent.

Mat money upon the said parcels is payable on the bill of lading quantity and amounts to £14 18s. 10d. in respect of the said parcels. Only freight as aforesaid and mat money and no other sums whatsoever would have been payable by bills of lading holders on completion of the voyage to Hamburg.

13. The said letters referred to in Clauses 9 and 11 hereof and the said bill of lading No. 28 are now produced and shown to me tied up in a bundle marked "R.A.M." and paged 1 to 3 inclusive. The other bills of lading hereinbefore mentioned are in the same form as the said bill of lading No. 28.

Sworn at 61 & 62, Gracechurch Street,  
in the City of London, this 6th day } R. MERZ.  
of May, 1915.

Before me,

H. MORGAN NASH,

A Commissioner for Oaths.

### Registrar's Report.

This Reference which came before me on July 14th, 1915, arose out of a judgment of the Court on June 7th last, by which a Reference was ordered to ascertain the amount of freight and charges due from the Russian Bank for Foreign Trade, to whom part of the cargo of the *Iolo* had been released. The claimants were the owners of the *Iolo*.



STEAMSHIP  
"IOLO,"

In July, 1914, the *Iolo* sailed from Nicolaieff with a grain cargo for Hamburg. When off the Lizard the master was directed by the Admiralty to go to Barry, where the *Iolo* arrived on August 19th; on the same day the cargo was seized as prize, a writ was served on September 1st, and on September 5th the *Iolo* was ordered to Portishead to discharge her cargo—this discharge was completed on September 17th.

At the Reference the claimants were represented by Mr. Noad, the Russian Bank by Mr. R. A. Wright; the Procurator-General, who was interested in other parts not included in the particular judgment of the Court, was not represented.

The first head of the claim was for freight. The full freight on the cargo discharged was clearly due, indeed it was not contested, and the proportion payable to the Russian Bank became therefore a matter of adjustment of accounts.

The second head of the claim was for dock dues and other charges at Barry, which, it was argued, were payable to the owners of the *Iolo*. These are strictly, if allowable, disbursements by the Marshal on the realization of the cargo and are different from freight, which is a claim against the net proceeds. I am of opinion that these charges cannot be allowed. The *Iolo* came into Barry in consequence of the war; she would have had to go there or some other port. It is true that her cargo was seized there, but the primary cause of these charges was not the action of the Crown as captors, but the impossibility of going to Hamburg.

If the cargo had not been seized, the owners of the *Iolo* might or might not have been paid by those who represented the cargo owners. The charges at Portishead have been paid by the Marshal, and the Barry charges are on quite a different footing.

The third head of the claim was for demurrage, or, as Mr. Noad phrased it, damages for detention. This claim is clearly not allowable on several grounds.

(1) If damages, there has been no decree awarding the Claimants damages.

(2) If regarded as detention this Claim is not allowable because it is covered by the decision of the Court in the *Juno*.

These grounds would alone be sufficient for the rejection of this head, but I may add that there would necessarily have been some delay in dealing with the cargo if it had not been seized, the consignees being at Hamburg.

There is no evidence that there was any unreasonable delay by the Crown or the Marshal in dealing with the cargo, or that the time lost at Barry was greater than would have been the case if the cargo had not been seized.

The Russian Bank has offered the sum of £1,120 in payment of freight and charges due from them. The total freight payable is £2,090 0s. 4d., and of mat money £28 3s. 10d., the amount in respect of the share of the Russian Bank is £1,103 17s. 10d., and in respect of mat money £14 18s. 10d., making a total of £1,118 16s. 8d. in respect of the claim referred to me and due to the claimants.

Deductions for charges at Portishead, &c., are not matters arising in this Reference, and the final accounts must be adjusted in accordance with this report, so far as relates to the matters raised in this Reference.

(Signed) E. S. ROSCOE,

Registrar.

July 20th, 1915.



## Notice of Motion.

CLAIM OF IOLO MORGANWG STEAMSHIP  
COMPANY, LIMITED.STEAMSHIP  
"IOLO."

TAKE NOTICE that the Court will be moved on the 25th day of October, 1915, or so soon thereafter as Counsel can be heard by Counsel on behalf of the above-named claimants, for an Order that the Report of the Registrar herein assessing the amount of freight, extra expenses and charges and/or damages due to the claimants be rejected and not confirmed in so far as it relates to the items claimed, other than the bill of lading freight and mat money (being items in respect of extra expenses and detention of the steamship *Iolo* occasioned by the special and exceptional circumstances appearing in the claim of the claimants), and that such items be allowed at the amounts claimed, or for such other Order as to the Court may seem just, and costs.

Dated the 11th day of October, 1915.

BOTTERELL & ROCHE,

Of 24, St. Mary Axe, E.C.,

Agents for

VAUGHAN & ROCHE,

Of Cardiff,

Solicitors for the Claimants.

Steamship “ Iolo ” (Motion on Objection to the Registrar’s Report).

JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*) :  
I dealt with the general principles which should govern this class of case in the two cases which have been referred to—the *Juno*\* and the *Tredegar Hall*†—and there are certainly no special circumstances in this case which call upon the Court to depart from the rule upon which it acted in those two cases.

1915  
Nov. 8.

STEAMSHIP  
“ IOLO.”

Parties must remember that inconveniences of a serious kind are caused to British subjects engaged in trade at the outbreak of war, by reason of the outbreak of war, and it is not every loss which is suffered by a citizen in these circumstances which can be recompensed by allowing a claim against the Crown or against any official of this Court.

It is not alleged here that there was any misconduct nor any undue delay on the part of the Marshal or of any of the authorities. The Registrar in his Report says :

There is no evidence that there was any unreasonable delay by the Crown or the Marshal in dealing with the cargo, or that the time lost at Barry was greater than would have been the case if the cargo had not been seized.

I think that that paragraph in the Registrar’s Report is perfectly accurate. We cannot enter into all these niceties as to the losses caused to vessels by various circumstances arising from the outbreak of war. We know, on the other hand, as a matter of public knowledge, that vessels by reason of the war have been earning enormous profits. This Court does not deal with such matters. In this and other cases there is, happily, a very good feeling existing between shipowners and the authorities

\* (1914). ante Vol. I., page 177.

† (1915), post, page 369.



1915  
Nov. 8.

STEAMSHIP  
"IOLO."

who are acting for the Crown; and what is done in every case practically, as in this, is done as a matter of friendly co-operation between the owners and the Crown.

There is no ground for the claim which is made for demurrage or damages or for any other sum of money, by whatever name it may be called. The Motion is rejected, and the Registrar's Report is confirmed. With regard to costs, it is true that Mr. Wright's clients—the Russian Bank for Foreign Trade, to whom a portion of the goods were released—had notice to appear here. That may have been given as a matter of courtesy, as it sometimes is; but it does not follow, according to the practice of the Courts of law, that that entitles them to the costs if they choose to attend. I do not give any costs.

Mr. LEWIS NOAD : I am instructed to ask your Lordship for leave to enter an appeal.

The PRESIDENT : This is an interlocutory matter, and I refuse leave to appeal.

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#### COUNSEL

For the Claimants, the Owners  
of the *IOLO* ... .. *Lewis Noad.*

For the Russian Bank for  
Foreign Trade ... .. *R. A. Wright.*

#### SOLICITORS

For the Claimants, the Ship-  
owners ... .. *Botterell & Roche,*  
*Agents for*  
*Vaughan & Roche, Cardiff.*

For the Russian Bank for  
Foreign Trade ... .. *Coward & Hawksley, Sons &*  
*Chance.*

British Steamship  
**“TREDEGAR HALL.”** 3764 Tons.  
 (Part Cargo *Ex.*)  
 (W. H. R. DYETT, *Master.*)

*Owners:* Messrs. Edward Nicholl & Co., Cardiff.

This case is also reported  
**60 S. J.** 45.                      **32 T. L. R.** 9.

*British Vessel—Enemy Cargo—Diversion to British Port—  
 Seizure and Condemnation of Cargo—Freight Paid—No Further  
 Allowance.*

A British vessel, carrying a cargo to German ports, was diverted to Cork, where the cargo was discharged, the freight being paid by the Admiralty. The Court held that the shipowners were not entitled to compensation for delay or inconvenience, or the extra expense of discharging at a British port.

The *Tredegar Hall* was a British ship, owned by Messrs. Edward Nicholl & Co. She sailed from the River Plate in July, 1914, with a cargo of maize, bound for Hamburg and Emden. She called at St. Vincent and left there on July 23. On August 5 she arrived off Weymouth without knowledge of the war, and received orders through Lloyd's to go to the nearest British port and await orders.

That she did, letting go anchor at Weymouth. She was afterwards ordered into Portland, and then to Cork, where she arrived on August 16. The cargo was discharged and sold, and realized, less expenses, £34,482 14s. 3d. The freight, which amounted to £4,200 12s., was paid by the Admiralty to the shipowners. Part of the remainder was released to certain claimants, leaving a net amount of

1915  
*July 5.*

STEAMSHIP  
 “TREDEGAR  
 HALL.”

—  
 Before the  
 Right Hon.  
 Sir Samuel  
 Evans,  
 President of  
 the Probate,  
 Divorce, and  
 Admiralty  
 Division.



1915  
July 5.

STEAMSHIP  
"TREDEGAR  
HALL."

£25,767 7s. 11d. to be dealt with now. The whole of that sum was this day condemned, with the exception of £3,000 in respect of which Messrs. Bunge & Co., the shippers of part of the cargo, were given leave to file a claim.

The shipowners put forward a claim for extra freight for the voyage to Cork, and also claimed seven days' detention whilst waiting for orders, the total amount being £1,839 4s. 4d. That claim had been withdrawn.

The proceedings were then adjourned, and subsequently the claim of Messrs. Bunge & Co. was allowed by the Procurator-General.

1915  
Sept. 9.

The case came up for further consideration on September 9, when Messrs. Edward Nicholl & Co., by permission of the Procurator-General, again put forward their claim for extra freight and expenses.

Mr. F. N. R. LAING, K.C., for the Crown, said that when the case was last before the Court Messrs. Edward Nicholl & Co. put forward a claim for freight and expenses amounting to £1,839 4s. 4d. On that occasion Messrs. Nicholl & Co. withdrew the claim, intimating that they would proceed before the Committee. The claim was afterwards considered by the Committee, who, however, disallowed it on the ground that they were not competent to deal with it. Messrs. Nicholl & Co. then wrote asking to be allowed to put their claim before the Court again, and the Procurator-General agreed to that course being adopted.

The claim was made up thus :

	£	s.	d.
Freight from Weymouth to Cork, via Bristol Channel, at 5s. a ton .....	1,400	4	0
Seven days' detention at Weymouth ...	439	0	4
	£1,839	4	4

The claim was framed as follows :

The grounds of the said claim are that the *Tredegar Hall*, whilst on voyage from the River Plate with a cargo of

maize for delivery at Hamburg and Emden, was stopped in the English Channel by the Admiralty and sent to Weymouth, where she arrived on August 5, 1914, and was detained seven days and then sent by the Collector of Customs to Avonmouth and from thence to Cork, where her cargo, which had been sold by brokers, on behalf of the Crown, or the Admiralty Marshal, was discharged.

1915  
Sept. 9.

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STEAMSHIP  
"TREDEGAR  
HALL."

Alternatively the claimants say that the discharge at Cork cost them £16 14s. 8d. more than discharge at both Hamburg and Emden would have cost them had the vessel discharged there, and if the aforesaid claim for freight is disallowed the claimants claim this sum.

The case for the Crown was that the full chartered freight had been paid the shipowners, and that they ought to be well satisfied with that.

The PRESIDENT : Have they been paid as if they carried the cargo to Hamburg and Emden and discharged there ?

Mr. LAING : Yes ; and I submit on behalf of the Crown that the claimants are lucky to have got that. Other claims for detention have been considered and disallowed by your Lordship before now. Such delay is due to the misfortunes of war, and shipowners, I submit, must share in the misfortunes just as other people do.

With regard to the alternative claim for £16 14s. 8d., that I submit ought also to be disallowed, as the vessel could not in the circumstances continue her voyage to Hamburg and Emden.

Mr. C. ROBERTSON DUNLOP, for the claimants, said that the question was of great importance both to the Crown and shipowners, because the claim was one of a large number, similar in character, which were awaiting decision. It was, therefore, desirable that his Lordship, in this case, should lay down a principle on the lines of the *Juno*\* decision or by way of enlarging the principle laid down in that decision.

\* (1914), ante, Vol. I., 177, at page 189.



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The shipowners had been paid the amount of freight which they would have earned if they had carried the cargo to Hamburg and Emden. Their present claim was limited to a fair and reasonable sum for the voyage which the vessel made from Weymouth to Barry, and from the Bristol Channel on to Cork, an expense which was not contemplated at the time the rate of freight was fixed.

Broadly, the principle laid down in the *Juno*\* case was that the shipowners were entitled to such a sum for freight as was fair and reasonable in all the circumstances. In other words, the remuneration which they were to get was to be based not on principles applicable to freight recoverable at common law or contracts of affreightment, but on principles applicable to salvage.

The PRESIDENT: I had no intention of importing any principles from the law of salvage into the *Juno* case.

Mr. DUNLOP said he did not know whether his Lordship had principles applicable to salvage in mind, but, in saying that the shipowners were entitled to a fair and reasonable sum, he was laying down the principle applied in salvage cases. Really, it was not remuneration in the nature of freight, but remuneration in the nature of salvage.

He further submitted that there existed a right to claim reward for bringing into a favourable port what proves to be enemy cargo, and instanced the case of the *Venus*† in support of his contention that such reward could be claimed apart from questions of freight or salvage. He asked his Lordship to enlarge in this case the principle which he had laid down in the *Juno* and to say that the shipowners were entitled to fair and reasonable remuneration for the services rendered.

Mr. LAING, in reply, submitted that nothing further ought to be allowed to the shipowner in the way of extra

\* (1914), ante, Vol. I., 177, at page 189. † Cited ante, Vol. I., page 296.

freight, claimed really by reason of detention. If there was any amount due for "salvage," then the freight should not have been allowed. In the case of the *Venus* the awards were made on the recommendation of the Crown for meritorious action, but it was understood that this did not lay down a principle.

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### JUDGMENT.

The PRESIDENT (*The Right Hon. Sir Samuel Evans*) : The only matter which remains for determination in the case of the cargo of the *Tredegar Hall* is the claim which is made by Messrs. Edward Nicholl & Co. to a large sum of money, amounting to £1,839 4s. 4d., over and above the full freight which is due to the vessel under the charter-party if the goods had been delivered at Hamburg and Emden. There is an alternative claim for a small sum, with which I will deal in a moment. The vessel was brought into this country by means of a telegram through Lloyd's to the master of the vessel, and certain movements became necessary in the interests of the cargo, and also in the interests of the vessel herself, whereby she finally found herself, not at Hamburg or Emden, but at Cork, where the cargo was delivered, and where the ship was set free. There might be some question to be determined, in accordance with the principles I laid down in the *Juno*,\* as to the amount of freight to which this vessel was entitled in these circumstances; but no such question remains open in this particular case, because the Crown (through the Procurator-General) have paid to the shipowners the whole of the freight, so that no reference is necessary at

\* (1914), ante, Vol. I., 177, at page 189.



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all in order to ascertain the freight in accordance with the principles in the *Juno*. An attempt is now made to get a sum over and above that freight by way of compensation for delay, or inconvenience in taking the vessel from one place to another, and landing her cargo ultimately at Cork.

I intended to say in the *Juno* (and I think I did say) that no sum ought to be allowed to British shipowners in respect of any delay or inconvenience which might occur to a ship as the result of her diversion or detention for the purpose of seizing and making unlivery of confiscable enemy cargo. When I referred to the inconvenience or delay in the last paragraph but four of my Judgment, I intended to include any inconvenience or delay caused by the detention or diversion of the vessel from her chartered course. That is made clear, I think, in the final paragraph. In this case nothing happened except the delay and inconvenience which were caused by her diversion by reason of the war. It is a loss, if it be a loss, to the shipowners which results to them from the war, and for which, unfortunately, they cannot have any compensation. It is a loss like those which have to be submitted to by other citizens in other capacities and other walks of life, as I have already pointed out in the *Juno*. I think, in this case, that the owners of the vessel have been generously treated. They have been paid the full freight. If they had tried to proceed to Hamburg, I do not think it requires a very lively imagination to see what would have happened to the vessel. It was fortunate for her owners that she was diverted to this country, whether by reason of their own voluntary act, or by the action of His Majesty's cruisers.

With regard to the alternative claim of £16 14s. 8d., that is a claim which they put forward upon a comparison of estimated charges at Hamburg and Emden with the charges which have been borne at Cork. It is a small sum,

but I am asked to deal with it as a question of principle. I am referred to what I did in the case of the *Juno*. My impression is that the special items which I said ought to or might be allowed in that case were not allowed on any principle as a matter of legal right, but because I thought, having regard to all the circumstances of that case, that it might be the generous and proper thing to do, to give the extra costs which were there allowed. But if I am to deal with it as a question of principle—as I am asked to do to-day—I think it is quite clear (apart from the difficulties of ascertaining any sum of this kind, as has been pointed out by Mr. Laing, such as the difficulty of comparing the cost of discharging at Cork during wartime, and the cost of discharging at Hamburg and at Emden, if and when the vessel had arrived there), that these losses are losses which the shipowner sustains by reason of the war, and which he is not entitled to have brought into account in the estimation of the freight, according to the principles which I have laid down.

The claim of Messrs. Edward Nicholl & Co. must be disallowed.

Mr. DUNLOP : My clients are desirous of considering your Lordship's decision in this matter, and therefore I ask your Lordship formally for leave to enter an appeal, and to fix the amount.

The PRESIDENT : Is this one of the cases where you have got a right of appeal ?

Mr. DUNLOP : Yes, my Lord ; if not, I would ask for leave, as the case does raise an important question of principle.

The PRESIDENT : If you have no right to appeal without leave, I shall not give you leave.

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Mr. DUNLOP : Will your Lordship formally give me leave to enter an appeal?

The PRESIDENT : If you satisfy me that you have got a right to appeal without my leave, I cannot help giving you leave to admit the appeal, and I must fix the amount of security.

Mr. DUNLOP : If your Lordship will give me a formal right to enter an appeal.

The PRESIDENT : This is a final decision upon your claim --it is not an interlocutory decision, and there is a right of appeal, is there not ?

Mr. DUNLOP : Yes, there is.

Mr. R. A. WRIGHT : Yes, that is so under the Act.

The PRESIDENT : Very well, then, as you appear to have a right of appeal, I give you leave formally to admit the appeal.

Mr. DUNLOP : Then will your Lordship extend the time for appealing ?

The PRESIDENT : Yes ; for how long ?

Mr. DUNLOP : Will your Lordship say a month ?

The PRESIDENT : Yes ; leave to enter an appeal within a month, and, if the appeal is entered, security for costs to be given to the extent of £150.

Mr. DUNLOP : If your Lordship pleases.

## COUNSEL

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[illegible]

For the Shipowners ... .. *C. Robertson Dunlop.*

For the Claimants, Messrs. Bunge & Co. ... *H. C. S. Dumas.*

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## SOLICITORS

For the Crown      ...      ...      ...      ...      ...      *The Treasury Solicitor*  
*for the Procurator-General.*

For the Shipowners ... .. *Holman, Birdwood & Co.*

For Messrs. Bunge & Co. ... .. Thomas Cooper & Co.



Before the Judicial Committee of the Privy Council.

(*Present*: Lord Mersey, Lord Parker of Waddington, Lord Sumner, Lord Parmoor, and Sir Edmund Barton.)

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British Steamship

“**ROUMANIAN.**” 4906 Tons.

(Cargo *Ex.*)

(R. Ross, *Master.*)

*Owners*: Petroleum Steamship Co., Ltd.  
(Lane & Macandrew), London.

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On Appeal from the High Court of Justice, Probate, Divorce,  
and Admiralty Division.

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This case is also reported

[1916] 1 A. C. 124.

114 L. T. R. 3.

85 L. J. P. C. 33.

1 Trehern, 536.

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*Enemy Cargo of Petroleum—British Vessel—Shipment before War at American Port for German Port—Diversion to British Port after Outbreak of War—Discharge into Tanks on Shore—Seizure in Tanks—Jurisdiction of Prize Court—Right to Seize Enemy Goods on British Vessel and on Shore.*

A cargo of petroleum, belonging to a German company, was shipped before the war at an American port on a British vessel for carriage to a German port. After the outbreak of war the vessel was diverted to Purfleet, where a large portion of the petroleum had been pumped into tanks about 200 yards from the wharf where she lay, when the Customs authorities gave notice that the cargo was placed under detention. The discharge was afterwards completed some time before the issue of the writ.

The Judicial Committee of the Privy Council held that enemy goods laden on board a British vessel before the commencement of hostilities were liable to seizure, and that the Prize Court had jurisdiction in respect of the petroleum which had already been pumped into the tanks at the time of the seizure, as well as the rest of the cargo.

Judgment of the President condemning the cargo (ante, Vol. I., p. 279) affirmed.

This was an appeal from a judgment of the Right Honourable Sir Samuel Evans in the Prize Court, dated December 7, 1914 (reported ante, Vol. I., p. 279), condemning a cargo of petroleum laden on the British steamship *Roumanian* as prize or droits in Admiralty. The cargo belonged to the Europäische Petroleum Union, a company formed by a combination of companies in various countries and incorporated at Bremen. It was shipped at Port Arthur, Texas, on July 24, 1914, for carriage to Hamburg, and, on the suggestion of the Admiralty, communicated to the managers of the vessel by Admiral Inglefield, the Secretary of Lloyd's, on August 4, the vessel was ordered by her owners to Dartmouth, whence she proceeded to the British Petroleum Company's wharf at Purfleet, where the discharge into the company's tanks, situated about 200 yards inland from the wharf, began on August 21. On August 22 the Customs authorities gave the master notice that the cargo was placed under detention, but the discharge of the cargo was continued and was completed on August 24. The writ in the proceedings was not issued until September 19. The facts of the case are fully set out in the report of the proceedings in the Prize Court (ante, Vol. I., p. 191). The President held that the petroleum was the property of an enemy, that it had been seized in fact, that the oil tanks into which it was being discharged were part of the port in which they were situated, and that it was lawfully seized as prize.

The appellants were the Europäische Petroleum Union

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Before the  
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and the companies domiciled in allied or neutral countries, who owned about nine-tenths of the shares in the Union. They submitted in their Case that the judgment was wrong and ought to be reversed for the following, among other, reasons :

(1) Because the Europäische Petroleum Union though a company incorporated at Bremen is in substance and reality a combination of companies carrying on business in allied or neutral countries and is not controlled by enemies of the Crown and the petroleum was in substance not property of enemies of the Crown.

(2) Because the interests in the said petroleum of the allied and neutral appellant companies which own about nine-tenths of the shares in the Europäische Petroleum Union ought to be protected.

(3) Because if the petroleum ought to be condemned at all, condemnation ought to be only in respect of the interest (about one-tenth of the whole) of the Deutsche Petroleum Company, which alone of the companies combined in the Europäische Union had an enemy character.

(4) Because there was no capture or seizure of any of the said petroleum as prize or droits in Admiralty until the service of the writ on the 21st September, and the petroleum, being then wholly on land, was not the subject of prize or droits in Admiralty, and not within the jurisdiction of the Prize Court.

(5) Because, even if the notice of detention on the evening of the 22nd August was a seizure as prize or droits in Admiralty, it could not affect the petroleum which was already in the tanks and which was no longer the subject of prize or droits in Admiralty, or within the jurisdiction of the Prize Court.

(6) Because, even if prize or droits in Admiralty and the jurisdiction of the Prize Court apply to goods seized "in port," there was no evidence that the tanks were within or formed part of any port.

(7) Because goods shipped before and not in contemplation of war on board a British ship which left her last port of departure before the declaration of war carried into a British port are not liable to capture or seizure as prize or droits in Admiralty on account of their enemy character alone.

The respondent, the Procurator-General, submitted in his Case that the appeal should be dismissed for the following, among other, reasons :

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(1) Because the petroleum was the property of an enemy in that it was owned by a German company, incorporated under the laws of the German Empire, and having its principal office and place of business in Germany.

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(2) Because the Prize Court was not called upon to look behind the nationality of the German company which owned the petroleum, or to inquire into the status or nationality of its individual shareholders.

(3) Because the appellants failed to give evidence of the status or nationality of the individuals interested in the shareholding companies.

(4) Because the list of shareholders may vary from day to day, but the enemy character of the German company will continue.

(5) Because the petroleum being already in the custody of the Customs officers was duly seized when the letter of the 22nd August, 1914, was written and sent to the master of the *Roumanian*, and was thenceforth liable to be proceeded against in the Prize Court for condemnation as prize.

(6) Because the petroleum in the oil tanks was at the time of its seizure in port, in that the oil tanks were part of the port.

The point that the petroleum was not enemy property was not argued.

Mr. MAURICE HILL, K.C., for the appellants, said that the principal question was whether goods could be seized as prize when they had been discharged, and if there was power to seize them whether the tanks into which the oil was discharged were within the legally defined limits of the Port of London.

Lord MERSEY : There is no doubt that the Crown has power to seize goods on land. It never does so, but it certainly has the right to do it.

Mr. HILL said that it had no right to go to a Prize Court



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to have the goods condemned. In the Order in Council of 1665, set out in the *Rebeckah*,\* and cited in the *Miramichi*,† goods in port meant goods afloat in port. The Order in Council of August 5, 1914,‡ and the Prize Court Rules§ were not applicable to the seizure of goods on land. When the ship had discharged her cargo the oil ceased to be cargo as far as the contract of carriage was concerned. It was in the possession of the warehouseman, not of the shipowner. He cited the following text writers to show that prize jurisdiction extends only to the high seas and territorial waters :

Westlake, *International Law*, Part II., War, p. 145.

Halleck, *International Law*, Vol. II., c. 22, s. 2; Sir Sherston Baker's edition, p. 98.

Oppenheim, *International Law*, 2nd ed., Vol. II., p. 182.

*Story on Prize Courts*, Pratt's edition, pp. 28, 29.

Dana's note in his edition of Wheaton's *International Law*, p. 451, cited in the *Miramichi*, ante Vol. I. at p. 169.

It was only in the case of seizure ashore by a naval expedition that goods on land were within the jurisdiction of the Prize Court. (See *Lindo v. Rodney* (1782), 2 Douglas (4th Edition) 612, note.) In such a case, as Lord Mansfield said, "the prey is, as it were, killed at sea, and taken upon land."

In support of the view that goods seized on land are not within the jurisdiction of the Prize Court he also referred to the following cases :

The *Two Friends* (1799), 1 Ch. Rob. 271; 1 E.P.C. 130, in which Sir William Scott distinguished the *Ooster Eems* (1784), 1 Ch. Rob. 284, note; 1 E.P.C. 136, note.

The *Hoffnung* (No. 3) (1807), 6 Ch. Rob. 383; 1 E.P.C. 583.

\* (1799) 1 Ch. Rob. 227, at page 230; 1 E.P.C. 118, at page 121.

† (1914), ante, Vol. I., at page 170.

‡ *Manual of Emergency Legislation*, page 248.

§ *Ibid.*, page 256.

The *Charlotte* (1808), 6 Ch. Rob. 386, note; 1 E.P.C. 585, note.

*Brown v. The United States* (1814), 8 Cranch, 110.

*1253 Bags, 103 Casks of Rice* (1862), 1 Blatchford, 211.

*Mrs. Alexander's Cotton* (1864), 2 Wallace, 404.

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The *Berlin Johannes*\* and the *Marie Anne*† were distinguishable. In the former case the vessel was seized in the Thames, in the latter the contract of carriage was still operative. In the *Thalia*‡ the seizure was by a naval expedition.

Even if goods could be seized on land, the seizure must be in port, and these goods were not seized in the Port of London. He referred to Hale's *De Portibus Maris* (Hargrave's *Law Tracts*, pp. 46, 47, 48), and the Port of London Act, 1908, 8 Edw. 7, c. 68.

LORD SUMNER : Your point is that there are no words in the statute which extend the Port of London area to a series of isolated tanks down at Purfleet.

LORD MERSEY : There are many ports, the areas of which are not defined by any statute. Then how do you find out ?

MR. HILL said that it was a question in each case. The Thames Conservancy Act, 1894, 57 and 58 Vict. c. clxxxvii., gave jurisdiction up to high-water mark, and the word "shore" meant the shore of the river so far as the tide flows and reflows between high and low water mark at ordinary tides. (See Section 3 and Schedule 2.) The Port of London Authority had no jurisdiction over the place where these oil tanks were situated. Whatever the rights

\* Rothery's *Prize Droits* (a report to the Treasury by Mr. Rothery Registrar of the Court of Admiralty during the Crimean War, published in 1915), page 125.

† Ibid., page 126.

‡ (1905), 2 *Russian and Japanese Prize Cases*, 116.



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of the Crown might be, in this case there was no right of prize.

Mr. C. ROBERTSON DUNLOP, following Mr. Hill, for the appellants, submitted that enemy goods shipped on board a British vessel before the outbreak of war were not the subject of prize. They were, even when war broke out, entitled to the protection of the British flag. The opposite view would amount to a breach of faith. He cited :

Westlake, *International Law*, Part II., War, p. 145.

Lawrence, *International Law*, 4th ed., p. 461.

Cohen, *Declaration of London*, p. 139.

Taylor, *International Law*, p. 723.

Bentwich, *War and Private Property*, p. 79.

Wehberg, *Capture in War on Land and Sea*, p. 68.

There was no reported decision of a British Prize Court in which enemy goods on a British ship at the commencement of hostilities had been condemned, and none before the *Juno*\* of a claim for freight by the owners of a British ship in respect of enemy goods. In the *Venus*† the point was not raised. The principle of the Declaration of Paris was inconsistent with the right of seizure in such a case. He wished to exclude any question of trading with the enemy. In the *Conqueror*‡ the goods were shipped after the outbreak of war, and the *Mashona*§ was a case of trading with the enemy. He also referred to the Russian and Japanese Regulations (*Russian and Japanese Prize Cases*, Vol. I., pp. 311 and 331) and the French Regulations (*Manual of Emergency Legislation*, supplement 3, p. 574).

At the conclusion of Mr. Dunlop's argument, their Lordships sat in private for a short time, and then, after

\* (1914), ante, Vol. I., 177.

† Rothery, *Prize Droits*, page 129; cited ante, Vol. I., page 296.

‡ (1800), 2 Ch. Rob. 303.

§ (1900), 17 Cape of Good Hope Sup. Ct. Rep. 129, 135; 10 Cape Times L.R. 163.

the parties had been called back, Lord MERSEY, addressing Sir Erle Richards, K.C., Counsel for the Crown, said: "Their Lordships will let you know if they desire to hear you on the question."

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### JUDGMENT.

The following Judgment was this day delivered by Lord PARKER OF WADDINGTON :

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This appeal relates to the cargo *ex* steamship *Roumanian*. The relevant facts are quite simple and are not in dispute.

The *Roumanian* is a British ship, and on August 4, 1914, the day on which war broke out between this country and Germany, was on a voyage from Port Arthur (Texas) to Hamburg with a cargo of some 6,264 tons of petroleum belonging to the Europäische Petroleum Union, a German company. On the same day the Admiralty, through the Secretary of Lloyd's, suggested to the owners that the ship should be diverted to some port in the United Kingdom, and the owners accordingly instructed the master to proceed to Dartmouth for orders. The ship arrived at Dartmouth on August 14, 1914.

On August 15 the Board of Trade issued a notice containing recommendations with regard to the treatment of cargoes belonging to an enemy in ships diverted from their original ports of destination. These recommendations appear to their Lordships to be so conceived as in no way to prejudice the liability (if any) of such cargoes to be seized as prize. It was recommended that the cargo should be landed at a dock, legal quay or sufferance wharf, either in the port at which the steamer had arrived or in some other safe port, and warehoused subject to ship-owners' and other charges until sale or disposal could be



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arranged for. If sold, the proceeds should be held for subsequent distribution to those entitled to the cargo, subject to shipowners' and other charges which might at law have priority to the claims of the persons entitled to the cargo or its proceeds. Obviously, if the cargo were liable to seizure as prize, seizure followed by condemnation in the Prize Court would entitle the Crown either to the cargo itself or the proceeds thereof, subject to such shipowners' or other charges as might, by law, take precedence of the Crown's interest.

On August 20 the *Roumanian* proceeded to London, arriving at Purfleet at noon on August 21. Before her arrival arrangements had been made to warehouse the petroleum in the tanks of the British Petroleum Company, Ltd., at Purfleet, and permission had been obtained from the Custom House authorities for its discharge into these tanks. When so discharged the petroleum would be in the custody of the Custom House authorities in the sense that it could not be removed therefrom without their sanction.

The work of discharge accordingly commenced at 12.15 p.m. on August 21, the petroleum being pumped into the tanks, which were situated some 100 to 150 yards from the wharf at which the vessel lay. Meanwhile the Custom House authorities took samples in order to test the specific gravity of the oil and ascertain whether or not it was dutiable.

About 7 p.m. on August 22 a letter from the Custom House at Gravesend was delivered on board the *Roumanian*, addressed to the master, stating that the cargo of about 6,264 tons of petroleum was placed under detention. This letter was not received by the master till 11 p.m. Roughly speaking, about 1,140 tons of oil remained undischarged at 7 p.m., and 570 tons at 11 p.m. on August 22. Notwithstanding the letter above referred

to, the work of discharging the oil continued. It was completed long before the writ in these proceedings, which did not issue until September 19, and was served by affixing the same to the tanks in which the petroleum was then warehoused.

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It will be observed that the letter giving notice of the detention of the cargo did not refer to its detention as prize, and it was accordingly argued on behalf of the appellants that there was no effectual seizure as prize until the writ in these proceedings was affixed to the tanks containing the petroleum. It is clear, however, that the Custom House is the proper authority to seize or detain, with a view to its condemnation as prize, any enemy property found in a British port. It is equally clear that the letter in question was intended to operate, and must have been understood by all concerned as intended to operate, as such a seizure. No other possible intention was suggested. Under these circumstances their Lordships are of opinion that the cargo was effectually seized as prize upon the delivery of the letter. The point, however, is of little importance in the view their Lordships take of the points of law, which will be dealt with presently, for if there was no seizure by delivery of the letter, there was admittedly a good seizure when the writ was served.

Under these circumstances three points were raised by Counsel for the appellants.

They contended, first, that so far as the petroleum was not afloat at the date of seizure, the Prize Court had no jurisdiction; secondly, that even if the Prize Court had jurisdiction, it ought not to have condemned the petroleum so far as at the date of seizure it was warehoused in the tanks of the British Petroleum Company, Ltd., and no longer on board the *Roumanian*; and, thirdly, that enemy goods on British ships at the commencement of hostilities



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either never were or, at any rate, have long ceased to be liable to seizure at all.

Obviously, if the last point is correct, it is unnecessary to decide the first two points. Their Lordships, therefore, think it desirable to deal with it at once.

The contention that enemy goods on British ships at the commencement of hostilities are not the subject of maritime prize was not argued before the President in the present case. It had already been decided by him in the *Miramichi*.<sup>\*</sup> Their Lordships have carefully considered the judgment of the President in the last-mentioned case, and entirely agree with it. The appellants' Counsel based their contention on three arguments. First, they relied on the dearth of reported cases in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, emphasizing the fact that in the case of the *Juno*† no authority could be found for the right of the master of a British ship on which enemy goods were seized as prize to compensation in lieu of freight, though if such goods were properly the subject of prize, the question must constantly have arisen. Secondly, they laid stress on certain general statements contained in text-books on International Law as to what enemy goods can now be seized as prize. Thirdly, they called in aid that part of the Declaration of Paris which affords protection to enemy goods other than contraband on neutral ships and the principle underlying or supposed to underlie such Declaration.

With regard to the dearth of reported decisions, it is to be observed that the plainer a proposition of law, the more difficult it sometimes is to find a decision actually in point. Counsel are not in the habit of advancing arguments which they think untenable, nor, as a general rule,

\* (1914), ante, Vol. I., page 157; [1915] P. 71.

† (1914), ante, Vol. I., page 177; 1 Trehern, 151.

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do cases in which no point of law is raised and decided find their way into law reports.) If, on the one hand, it be difficult to find a case in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, it is, on the other hand, quite certain that no case can be found in which such goods have been held immune from seizure. Further, inasmuch as by international comity British Prize Courts have in general extended to neutrals the privileges enjoyed by British subjects, we should, if this contention be correct, expect to find that enemy goods on neutral ships at the commencement of hostilities were alike immune from seizure. Their Lordships have been unable to find any authority which gives colour to this suggestion. There appears, indeed, to be no case in which for this purpose any distinction has been drawn between goods on board a neutral vessel at the outbreak of hostilities and goods embarked on a neutral vessel during the course of a war.

Their Lordships, therefore, are not impressed by the argument based on the dearth of actual decisions on the point. Moreover, the decisions, such as they are, certainly do not support but, indeed, contradict the appellants' contention. It is clear, from the cases cited in the *Miramichi*,\* that enemy goods embarked on British ships during the hostilities are the subject of Prize. (See, in particular, the *Conqueror*.†) In these cases the sole question decided has been the enemy character of the goods, and no stress has been laid on the time at which they were embarked, or on whether any person concerned had or had not been guilty of the common law offence of trading with the enemy. Further, there is the case of the *Venus*,‡ referred to in Rothery's *Prize Droits* at p. 129.

\* (1914), ante, Vol. I., page 157; [1915] P. 71.

† (1800), 2 Ch. Rob. 303.

‡ Cited ante, Vol. I., page 296.



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Their Lordships have thought it desirable to examine the papers preserved in the Record Office in connection with this case, the facts of which are as follow: The *Venus* was a British ship which at the outbreak of hostilities was on a voyage to Hamburg. Its cargo had been shipped at Genoa, Ancona, and Mentone. The master, hearing of the outbreak of war and desiring to avoid the risk of his ship being captured by the enemy, put into Plymouth. The Receiver of Admiralty droits at Plymouth, suspecting upon information given by the master that part of the cargo belonged to enemy subjects, seized both ship and cargo. The shipowners put in a claim for the release of the ship on the ground that it was British, and also for freight expenses and demurrage. The ship was ordered to be released. The claim for freight and expenses was allowed, there being a reference to the Proctor to ascertain the proper amount, which was declared a charge on the cargo. The claim for demurrage was disallowed. The amount to be allowed for freight and expenses was in due course certified by the Proctor, and apparently paid out of the proceeds of the cargo, which had been appraised and sold under the direction of the Court. Parts of the cargo or its proceeds were subsequently claimed by and released in favour of neutrals. The residue of the cargo was condemned as the property of enemy subjects.

The case of the *Venus* appears, therefore, to be an authority against the appellants' contention. They say, truly, that the point does not seem to have been raised; but it is far more likely that the point was not raised because it was thought to be untenable than that the Court overlooked what, according to the appellants' contention, must have been a well-known principle of prize law. Further, the *Venus* is certainly an authority in support of the President's decision in the *Juno*.\* Curiously

\* (1914), ante, Vol. I., page 177.

enough, the master of the *Venus*, though a British subject, is in the Proctor's report in the last-mentioned case referred to as the "neutral master," a fact which is only consistent with the practice of the Court in allowing freight being the same whether the enemy goods were seized on neutral or on British ships.

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With regard to the general statements contained in text-books on International Law, it is to be observed that none of those cited in support of the appellants' contention appears to have been based on any discussion of the point in issue. On the contrary, they are for the most part based on a discussion of the effect of the Declaration of Paris. Their Lordships do not think that any useful purpose would be served by examining these statements in detail. They will take one example only, that cited from Westlake's *International Law*, Part II., p. 145. The author has been discussing the effect of the Declaration of Paris, and sums up as follows :

We may therefore conclude that enemy ships and enemy goods on board them are now, by international law, the only enemy property which, as such, is capturable at sea.

In their Lordships' opinion the meaning of such statements must be judged by the context. They cannot be taken apart from the context as intended to be an exhaustive definition of what is or is not now the subject of maritime prize. It might just as well be argued that because the writer in the present case uses the expression "capturable at sea," he must have thought that enemy goods in neutral ships lying in British ports or harbours were, notwithstanding the Declaration of Paris, still subject to capture.

Such statements are in any case more than counter-balanced by statements contained in other well-recognized authorities. Thus, in addition to the passages quoted in



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the *Miramichi*\* from Dana's edition of Wheaton's *International Law*, it will be found that Halleck (*International Law*, Vol. III., p. 126) states that whatever bears the character of enemy property (with a few exceptions not material for the purpose of this case), if found upon the ocean or afloat in port, is liable to capture as a lawful prize by the opposite belligerent. It is the enemy character of the goods and not the nationality of the ship on which they are embarked or the date of embarkation which is the criterion of lawful prize. This is in full accordance with Lord Stowell's statement in the *Rebeckah*† of the manner in which the Order of 1665 defining Admiralty droits has been construed by usage.

Passing to the appellants' third argument, that based on the Declaration of Paris or the principle supposed to underlie such Declaration, it may be stated more fully as follows: [Enemy goods on neutral territory were never the legitimate subject of maritime prize. Such goods could not be seized without an infringement of the rights of neutrals. The rights of neutrals are similarly infringed if enemy goods be seized on neutral ships, but the law of prize having for the most part been formulated and laid down by nations capable of exercising and able to exercise the pressure of sea power, the rights of neutrals have been ignored to this extent, that the capture of enemy goods in neutral vessels on the high seas or in ports or harbours of the realm has been deemed lawful capture. The Declaration of Paris is in fuller accordance with principle; it recognizes that no distinction can be drawn between neutral territory and neutral ships. To use Westlake's expression (p. 145, *International Law*, Part II.), it assimilates neutral ships to neutral territory, recognizing that on both the authority of the neutral state ought (except

\* (1914), ante, Vol. I., page 157; [1915] P. 71.

† (1799). 1 Ch. Rob. 227; 1 E.P.C. 118.

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possibly in the case of contraband) to be exclusive. So far, the argument proceeds logically, but its next step is, in their Lordships' opinion, open to considerable criticism. If, say the appellants, neutral ships are assimilated, as on principle they should be, to neutral territory, British ships ought to be in like manner assimilated to British territory. Whatever may have been the case in earlier times, no one will now contend that the private property of enemy subjects found within the realm at the commencement of a war can be seized and appropriated by the Crown. The same ought, therefore, to hold of enemy goods found in British ships at the commencement of war. This part of the argument is, in their Lordships' opinion, quite fallacious. The Declaration of Paris, in effect, modified the rules of our Prize Courts for the benefit of neutrals. It was based on international comity, and was not intended to modify the law applicable to British ships or British subjects in cases where neutrals were not concerned. Its effect may possibly be summed up by saying that it assimilates neutral ships to neutral territory, but it is impossible to base on this assimilation any argument for the immunity of enemy goods in British ships.

The cases are not *in pari materia*. If the Crown has ceased to exercise its ancient rights to seize and appropriate the goods of enemy subjects on land, it is because the advantage to be thus gained has been small compared with the injury thereby entailed on private individuals, or in order to ensure similar treatment of British goods on enemy territory. But one of the greatest advantages of sea power is the ability to cripple an enemy's external trade, and for this reason the Crown's right to seize and appropriate enemy goods on the high seas or in territorial waters or the ports or harbours of the realm, has never been allowed to fall into desuetude. In order in the fullest degree to attain this advantage of sea power our Courts



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have always upheld the right of seizing such goods even when in neutral bottoms, and neutrals have always admitted or acquiesced in the exercise of that right, either because it was deemed to be a legitimate exercise of sea power in time of war or because on some future occasion they themselves might be belligerents and desire to exercise a similar right on their own behalf. Those who were responsible for the Declaration of Paris had not to weigh the advantage to be gained by the seizure of enemy goods on neutral ships against the injury thereby inflicted on private owners, but against the demands of international comity. The fact that we sacrificed on the altar of international comity a considerable part of the advantages incident to power at sea is no legitimate reason for making a further sacrifice where no question of international comity can possibly arise.

Their Lordships hold therefore, on this part of the case, that enemy goods on British ships, whether on board at the commencement of the hostilities or embarked during the hostilities, always were, and still are, liable to be seized as prize, either on the high seas or in the ports or harbours of the realm. It follows that the petroleum seized on board the *Roumanian* was properly condemned as prize.

The next point to be considered is the jurisdiction of the Prize Court so far as the petroleum in question was, when seized as prize, warehoused in the tanks of the British Petroleum Company, Ltd., and no longer on board the *Roumanian*. The appellants contended that it is the local situation of the goods seized as prize which determines the jurisdiction of the Prize Court. If such goods be, at the time of seizure, on land and not afloat, it is not, they contended, the Prize Court but some Court of Common Law which has jurisdiction to determine the rights of all parties interested. In their Lordships' opinion, this contention

also fails. The chief function of a Court of Prize is to determine the question, "prize or no prize"; in other words, whether the goods seized as prize were lawfully so seized, so as to raise a title in the Crown. In determining this question, the local situation of the goods at the time of seizure may be of importance, but it is the seizure as prize and not the local situation of the goods seized which confers jurisdiction. If authority be needed for this proposition, it may be found in Lord Mansfield's judgment in the case of *Lindo v. Rodney*, reported in a note to *Le Caux v. Eden* in 2 Douglas (4th Edition) at p. 612. It must be remembered that the jurisdiction of the Prize Court is based in every case upon a commission under the Great Seal. Lord Mansfield pointed out that in the case before him, the commission under which the Court derived jurisdiction conferred jurisdiction in all cases of prize whether the goods sought to be condemned were taken on land or afloat. The same may be said of the commission in the present case. In his opinion, however, it was necessary to draw a distinction in this connection between the jurisdiction of the Court of Admiralty as a Court of Prize and its jurisdiction apart from the commission which constitutes it a Court of Prize. To give the Court of Admiralty as such jurisdiction, the matter complained of must have occurred on the high seas, but in all matters of prize it was not the Court of Admiralty as such, but the Court of Admiralty by virtue of the commission which had jurisdiction, and this jurisdiction was exclusive, whether the goods seized as prize were on land or afloat. The only authority which, at first sight, appears to be in conflict with Lord Mansfield's decision is the case of the *Ooster Eems*,\* to which, for the reasons hereinafter mentioned, no great weight can be given.

Their Lordships will now proceed to consider the

\* (1784), 1 Ch. Rob. 284. note; 1 E.P.C. 136, note.

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appellants' contention that even if the Prize Court had jurisdiction it ought nevertheless to have decided against the condemnation of the petroleum in question so far as it was not actually afloat on board the *Roumanian* at the time of seizure. They admitted that during the war no order for restitution or release could properly be made in favour of the German owners, but they suggested that the proper course was to hand the petroleum over to the Public Trustee or some other official for safe custody until the restoration of peace. No case where any such course has been pursued was cited.

The real question is whether the petroleum in question is, according to the law administered by Prize Courts in this country, properly the subject of maritime prize, although locally situated on shore. All enemy ships and cargoes which may, after the outbreak of the war, be found afloat on the high seas or in territorial waters or in the ports or harbours of the realm are liable to seizure as maritime prize. The petroleum in question was undoubtedly enemy property. It was undoubtedly on the high seas at and after the declaration of war. It became liable to seizure as prize as soon as war was declared. It did not cease to be so liable by being carried into Dartmouth or thence to Purfleet. It clearly remained so liable while still afloat. Did it cease to be so liable when pumped into the tanks of the British Petroleum Company, Ltd.? In the course of the argument Counsel were asked to suggest some intelligible reason why it should cease to be so liable. No satisfactory reason was suggested, and their Lordships have been unable to discover one for themselves. The argument of Counsel was based on the assumption that no enemy goods not actually afloat at the time of seizure could be lawfully seized as prize, unless possibly they could be considered as locally situate within a port or harbour, and that the tanks of the British Petroleum Company, Ltd.,

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could not be considered as part of the Port of London. There is, in their Lordships' opinion, no ground for this assumption. The test of ashore or afloat is no infallible test as to whether goods can or can not be lawfully seized as maritime prize. It is perfectly clear, for instance, that enemy goods seized on enemy territory by the naval forces of the Crown may lawfully be condemned as prize.

The same is true of goods seized by persons holding letters of marque, and even of goods seized by persons having no authority whatever on behalf of the Crown, when the Crown subsequently ratifies the seizure. This is clear from the case of *Brown and Burton v. Franklyn*,\* quoted in Lord Mansfield's judgment above referred to. Brown and Burton, the masters of a vessel belonging to the East India Company, seized enemy goods on land. They had no letters of marque. The King's Proctor instituted proceedings in the Prize Court, and having obtained a condemnation of the property as prize proceeded against Brown and Burton for an account. The latter instituted proceedings at Common Law for a prohibition on the ground that the goods taken were on land, but relief was refused. Moreover, Lord Mansfield, in *Lindo v. Rodney*,† expressly approves an admission made by Counsel in that case to the effect that it would be "spinning very nicely" to contend that if the enemy left their ship and got on shore with money and were followed on land and stripped of their money this would not be a lawful maritime prize. If this be, as it seems to their Lordships to be, good law, the present is an *a fortiori* case. In the case put by Counsel the landing of the goods was made by the enemy with the object of escaping capture afloat. In the present case such landing was by British subjects who had the enemy goods in their possession and did not know what else to do with

\* (1698), 2 Douglas, 613, note, at page 618.

† (1782), 2 Douglas (4th Edition), 612, note.



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them, and were pursuing a course recommended by the Board of Trade, and in no way intended to prejudice the Crown's rights.

With regard to the authorities quoted in this connection they have, in their Lordships' opinion, with one possible exception, no real bearing on the point. In the *Hoffnung* (No. 3)\* the cargo seized on shore had been landed and sold prior to the declaration of war. These goods, therefore, even if enemy goods at all, were never liable to seizure as prize. They were not, in fact, seized, nor was any proceeding taken against them, but an attempt was made to recover against the ship which had brought them the value of the goods so sold, the ship itself belonging to a neutral. This claim was rejected by the Court. It was held that unless it could be shown that the hand of capture had been employed on these goods in quality of cargo the Court could not go back to affect them in any other character. The same principle was recognized in the *Charlotte*,† in which it was held that the proceeds of goods landed and sold prior to the seizure of the ship, and never themselves seized, were not amenable to the jurisdiction of the Court.

In *Brown v. The United States*‡ it was decided on the facts that the goods in question were in the position of enemy goods found on American soil at the commencement of the hostilities, and not, therefore, the subject of maritime prize. That case, therefore, is clearly distinguishable from the present.

The only case which raises any difficulty is that of the *Ooster Eems*.§ There is no satisfactory report of this case. It is mentioned in the note on p. 284 of 1 Ch. Rob. and in the preface to *Hay and Marriott's Decisions*, p. xxvii. Their Lordships have, however, examined the

\* (1807), 6 Ch. Rob. 383; 1 E.P.C. 583.

† (1808), 6 Ch. Rob. 386, note; 1 E.P.C. 585, note.

‡ (1814), 8 Cranch, 110.

§ (1784), 1 Ch. Rob. 284, note; 1 E.P.C. 136, note.

papers relating to it preserved in the Record Office. The *Ooster Eems* was a Prussian, and therefore a neutral, vessel. It was stranded on the Goodwin Sands on a voyage from Texel to the East Indies. Before it broke up, part of its cargo was sent ashore, including some boxes of silver coin. The latter were deposited by the master with the Prussian Consul at Deal. One Jeremiah Hartley, an officer of the Court of the Cinque Ports, acting under an order of attachment issued by such Court sitting as an Admiralty Court, seized and obtained possession of the goods so landed, including the boxes of silver, on behalf of the Warden of the Cinque Ports. The seizure may have been intended to be a seizure of enemy goods as maritime prize, though their Lordships have been unable to ascertain that the Court of the Cinque Ports had any jurisdiction in prize. The Warden took no proceedings either in his own or any other Court with a view to having the goods lawfully condemned. The master, therefore, obtained from the High Court of Admiralty in England a monition requiring Jeremiah Hartley and the Warden and all others whom it might concern to appear and proceed to the legal adjudication in that Court whether the goods seized were lawful prize or not. The King's Proctor subsequently intervened. Certain depositions were filed which appear to raise some suspicion that the goods were Dutch and, therefore, enemy goods, but there was no real evidence to that effect. The master deposed that he did not know to whom the goods belonged, and under these circumstances one would have expected that the Court would have acted on the presumption arising from the fact that the ship was a neutral ship. The Court, however, made an interlocutory decree condemning the goods on the ground that the goods which apparently were assumed to be enemy goods were not at the time of seizure "in a privileged vehicle or on neutral territory."

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All questions between the Crown and the Warden were reserved. The master appealed to the Lords Commissioners of Appeal in Prize, and on such appeal the order for condemnation was discharged, not on the merits but, in the words of the Privy Council Journals, on the ground that :

. . . the High Court of Admiralty in England, the Court appealed from, had not a jurisdiction over the goods seized and proceeded against in this cause.

The records of the Privy Council do not contain any note of the reasons which led to this decision. It would appear, however, from the case of the *Two Friends*\* that Lord Stowell had before him some note of these reasons, for he represents Lord Thurlow as saying that

. . . those goods had never been taken on the high seas, they had only passed in the way of civil bailment, on delivery into civil hands; and were afterwards arrested on shore as prize.

If this be correct it may mean that in the opinion of the Lords Commissioners it is the local situation of the goods seized as prize, and not the seizure as prize, which determines the jurisdiction of the Prize Court, a decision diametrically opposed to the judgment of Lord Mansfield in *Lindo v. Rodney*,† which had been pronounced only three years previously. On the other hand, it may mean that the goods in question were not liable to seizure as prize because they were not on the high seas but on land, in which case Lord Thurlow was deciding the very point which he held the Court of Admiralty had no jurisdiction to decide, and he ought to have ordered the restitution of the goods to the master instead of leaving that somewhat hardly-used individual to his remedies at Common Law, in the assertion of which he would have in some way or other

\* (1799), 1 Ch. Rob. 271; 1 E.P.C. 130.

† (1782), 2 Douglas (4th Edition), 612, note.

to get over Lord Mansfield's judgment to the effect that prize or no prize could only be determined in a Prize Court.

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Moreover, it is almost impossible to suppose, in the then state of the authorities, that Lord Thurlow thought that to constitute lawful prize the seizure must have been on the high seas. It was already well settled that enemy ships and goods in the ports or harbours of the realm were the subject of maritime prize. It was equally well settled that enemy goods on enemy territory seized by the maritime forces of the Crown, or persons having letters of marque, could properly be condemned as prize. If, therefore, he used the expressions attributed to him by Lord Stowell some other explanation must be found.

In their Lordships' opinion a reasonable explanation of the case and of Lord Thurlow's words may be found in the following consideration. It appears that the Court of the Cinque Ports in its capacity as an Admiralty Court had taken possession of the goods at the instance of the Lord Warden. There was, therefore, a matter pending in the Cinque Ports which, so far as their Lordships can discover, was not a Court of Prize. The effect of the monition was to remove this matter to the High Court of Admiralty for trial there. In so trying it the High Court would be exercising an Admiralty and not a prize jurisdiction. As appears by Lord Mansfield's judgment in *Lindo v. Rodney*,\* in order to found an Admiralty jurisdiction the complaint must be made of something done on the high seas. This explanation would fully account for the words used by Lord Thurlow, though it must be admitted that Lord Stowell took a different view as to what he meant.

In any event their Lordships do not consider that the *Ooster Eems*† has any value as an authority. It has never

\* (1782), 2 Douglas (4th Edition), 612, note.

† (1784), 1 Ch. Rob. 284, note; 1 E.P.C. 136, note.



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been followed, and, apparently, has been cited twice only, and in each case distinguished. It is so cited and distinguished in the *Two Friends*,\* above referred to, and also in the *Progress*.†

In the last-mentioned case certain British ships with their cargoes had been captured by the French. It is not clear whether they were captured at sea and taken into Oporto after the French occupation, or whether the French found them in the harbour of Oporto when they took possession of it. The French appear to have landed part of the cargoes, which was warehoused on shore at the time when the military forces of the Crown took Oporto. It was, however, held upon the facts that there had been a capture by the French and a re-capture by the military forces of the Crown of both ships and cargoes.

Lord Stowell allowed a claim for salvage on the part of the military authorities in respect of that portion of the cargoes which had been landed as well as of the ships and that portion of the cargoes remaining on board. He distinguished the *Ooster Eems*‡ on the ground, as their Lordships understand the decision, that the master of the *Ooster Eems*, in landing the goods, was acting within his authority derived from the owners of the goods, whereas the landing in the case he was considering had been effected by persons acting without authority from and contrary to the interests of the owners. The same ground of distinction would appear to be applicable to the case their Lordships are considering. The petroleum was not warehoused pursuant to any authority given by the owners, but in breach of the contract for its carriage to Hamburg, and so far as the owners were concerned, this was as much a hostile act as the landing of the goods by the enemy captors in the case of the *Progress*. In neither case, to use Lord

\* (1799), 1 Ch. Rob. 271; 1 E.P.C. 130. † (1810), Edwards, 210.

‡ (1784), 1 Ch. Rob. 284, note; 1 E.P.C. 136, note.

Stowell's expression, was the continuity of the character of the goods landed as cargo in any way interrupted.

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There are only two other cases which need to be referred to in this connection. The first is that of the *Marie Anne*.\* In this case, at the outbreak of the war with France on May 16, 1803, the *Marie Anne*, a French ship, was under repair at Ramsgate, and certain parts of her cargo had been landed and were warehoused. Both the ship and the goods so landed were seized as prize, and in due course condemned as such. There is no record of the reasons which influenced the Court. It may be that the warehouses in which the goods were deposited were considered as part of a harbour or port of the realm, so as to bring the case within the ordinary definition of goods liable to seizure as prize. It may be that the goods having been temporarily landed while the vessel was repaired, were still considered as part of the cargo though not actually on board. The case, however, is clearly inconsistent with the proposition that goods seized on land cannot be lawful prize. The same may be said of the case of the *Berlin Johannes*† if, as would appear to be the case, the goods already landed were seized and condemned as prize.

If these decisions turned on the question whether the goods though landed were still in port they are authorities against the appellants, for no valid distinction can be suggested between a warehouse for the receipt of goods brought into harbour by sea and the tanks in which, in the present case, the petroleum was stored.

Their Lordships, therefore, have come to the conclusion that the petroleum on board the *Roumanian*, having from the time of the declaration of the war onwards been liable to seizure as prize, did not cease to be so liable merely because the owners of the vessel, not being able to fulfil their contract for delivery at Hamburg, pumped it into

\* Rothery's *Prize Droits*, page 126. † Rothery's *Prize Droits*, page 125.



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the tanks of the British Petroleum Company, Ltd., for safe custody, and that, therefore, its seizure as prize was lawful. They see no reason to dissent from the judgment of the President to the effect that these tanks constituted part of the Port of London for the purpose of applying the rule relating to the liability to seizure of enemy's goods in the ports and harbours of the realm, but it is unnecessary to decide this point.

For the reasons hereinbefore appearing their Lordships are of opinion that the appeal should be dismissed, and they will humbly advise His Majesty accordingly.

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#### COUNSEL

For the Crown	...	...	...	<i>The Attorney-General</i> ( <i>The Right Hon. Sir Edward Carson, K.C., M.P.</i> ) <i>Sir H. Erle Richards, K.C.</i> <i>Theobald Mathew.</i>
For the Appellants	..	...	...	<i>Maurice Hill, K.C.</i> <i>R. H. Balloch.</i> <i>C. Robertson Dunlop.</i>

#### SOLICITORS

For the Crown	...	..	...	<i>The Treasury Solicitor</i> <i>for the Procurator-General.</i>
For the Appellants	...	...	...	<i>Ince, Colt, Ince &amp; Roscoe.</i>

Before the Judicial Committee of the Privy Council.

(*Present*: Lord Mersey, Lord Parker of Waddington, Lord Sumner, Lord Parmoor, and Sir Edmund Barton.)

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German Barque

**"ODESSA."** 4 Masts. 3046 Tons.  
(Cargo *Ex.*)

*Owners*: Rhederei-Akt. Ges. von. 1896, Hamburg.

AND

British Steamship

**"WOOLSTON."** 2986 Tons.  
(Cargo *Ex.*)

*Owners*: Hants Steam Navigation Co., Ltd.  
(H. A. Williams & Co.), Cardiff.

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This case is also reported

[1916] 1 A. C. 145.	114 L. T. 10.
85 L. J. P. C. 49.	32 T. L. R. 103.
1 Trehern, 554.	

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*Nitrate of Soda Cargoes—Shipments before Outbreak of War—Capture after Outbreak of War—Enemy Property—Advances by British Bankers—Pledge to British Bankers—Special Property Created by Pledge—Rights of Lord High Admiral and Crown—Bounty of Crown—Civil List Acts.*

Two cargoes of nitrate of soda, the property of German firms, shipped on a German and a British vessel respectively before the outbreak of war, were pledged to a firm of British bankers. The Judicial Committee held, affirming the judgments of the President ((1914), ante, Vol. I., pp. 323 and 342), that the interest of the pledgees could not be recognized by the Prize Court against the



claim of the Crown for the condemnation of the cargoes as enemy property.

The Judicial Committee also held that the power of bounty exercised by the Crown by way of redress of hardships has not been affected by the Civil List Acts, 1 Edw. VII., c. 4, and 10 Edw. VII. & 1 Geo. V., c. 28.

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AND  
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—  
Before the  
Judicial Com-  
mittee of the  
Privy Council.

These were consolidated appeals from decisions of the President of the Probate, Divorce, and Admiralty Division (The Right Hon. Sir Samuel Evans) sitting in Prize. The President held that the Prize Court would not recognize the claim of British bankers who had made advances in the security of enemy cargoes, and condemned the goods as enemy property.\*

In the case of the *Odessa* the facts were as follow : By letters of March 26 and March 27, 1914 (following on a similar course of business of long standing), the Rhederei Actien Gesellschaft von 1896, of Hamburg, requested the appellants to open a credit in favour of Weber & Co. (a Chilean firm), of Valparaiso, and thereunder to accept Messrs. Weber's drafts at 90 days' sight for about £41,000, if such drafts were accompanied by bills of lading for a cargo of nitrate, the appellants to charge  $\frac{1}{4}$  per cent. acceptance commission. Weber & Co. accordingly issued drafts at 90 days' sight drawn on the appellants for £41,153 1s. 5d. against a shipment of nitrate by the *Odessa*, and by letters of May 12, May 16, and June 2 sent them the bill of lading for the cargo. The appellants accepted the drafts on June 9, 1914, payable on September 10, 1914, and paid them in due course. The bill of lading, which the appellants held throughout, described the *Odessa* as " bound for Channel for orders," and made the cargo deliverable " to Messrs. J. Henry Schröder & Co., London, or to their assigns." On August 19, 1914, the

\* The *Odessa* (1914), ante, Vol. I., 301. at page 323; the *Woolston* (1914) ante, Vol. I., 332. at page 342.

*Odessa*, which was a German barque, was captured by H.M.S. *Caronia*, and brought into Bantry Bay. On August 31 a writ was issued in the Prize Court by the Procurator-General against the *Odessa* and against her cargo, claiming condemnation of both as enemy property. The appellants entered an appearance on September 5, 1914, and filed their claim for release of the cargo, alleging that it was the property of themselves as British subjects, and/or as holders for full value of the bills of lading.

In the case of the *Woolston* the facts were as follow : By letters of January 13 and January 15, 1892 (following on a course of business of long standing), the appellants agreed, at the request of Messrs. H. Folsch & Co., of Hamburg, to accept drafts for their account against deposit of documents or other first-class securities. The appellants accordingly accepted drafts for account of Folsch & Co., of Hamburg, and as security Messrs. H. Folsch & Co., of Valparaiso, by letters of July 20, 1914, sent to the appellants in London bills of lading dated Antofagasta, June 27, 1914, and Mejillones, July 8, 1914, for a cargo consisting of 20,735 and 31,938 bags of nitrate shipped at these ports by Folsch & Co., of Valparaiso, on board the British s.s. *Woolston*. The bills of lading, which were received by the appellants on August 1 and August 7, and had since been held by them, described the *Woolston* as " bound for Las Palmas for orders." The bills of lading made the cargo deliverable " unto Messrs. J. Henry Schröder & Co., London," and incorporated all the terms and conditions of the charter-party. By the charter-party, which was dated May 29, 1914, the vessel was to proceed as ordered before sailing, or if not so ordered then as ordered at Dover to a safe port in the United Kingdom or on the Continent between Havre and Hamburg. After the arrival of the *Woolston* at Las Palmas, the appellants ordered her to proceed to Liverpool and there discharge

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her cargo. She arrived at Liverpool on September 5. The appellants had already endorsed the bills of lading to Messrs. Thos. Cheshire & Co., warehousemen at Liverpool, with instructions to take delivery of the cargo and warehouse it on behalf and account of the appellants. The cargo was accordingly discharged and warehoused in Liverpool, and Messrs. Thos. Cheshire & Co., as warehousemen, on October 6, 1914, sent to the appellants a warehouse warrant for the goods. The appellants paid for marine and fire insurance, freight, demurrage, landing and superintending charges and warehouse rent on the goods, sums amounting to £6306. The goods were provisionally detained by the officers of Customs at Liverpool on September 15, and were seized as Prize on December 31, 1914. On January 8, 1915, a writ was issued in the Prize Court by the Procurator-General against the cargo *ex s.s. Woolston*, claiming condemnation. The appellants entered an appearance on January 13, 1915, and on February 11, 1915, filed a claim for release of the cargo or, in the alternative, for the payment of their disbursements in respect of the cargo out of the proceeds thereof.

In their Case the appellants submitted that the judgments of the President should be reversed for the following reasons :

(1) Because the appellants had such a right to the goods and interest in them as the Prize Court ought to recognize and protect.

(2) Because at the time of capture the appellants were the only persons entitled to take possession of the goods and to deal with them.

(3) Because the right and interest of the appellants ought not to be destroyed by reason of the fact that enemy parties might have redeemed the goods from the appellants, especially in view of the fact that such right of redemption under any contract between the appellants and the said enemies had been dissolved on the outbreak of war.

(4) Because the objection sustained in earlier English cases in Prize as regards ships against the recognition of

liens, charges or mortgages dependent upon private arrangements with the owners, not apparent on the ship's papers or cognizable by the captors, is inapplicable to cases such as this in which, upon the face of all documents available to the captors, the appellants are apparent owners of the goods, and in which the fact that enemy subjects have a right to redeem the goods from the appellants is ascertainable only by reason of evidence disclosed by the appellants.

(5) Because if the Crown have any *prima facie* right to claim condemnation of the goods by reason of the abstract property therein being in enemy subjects, yet that right of confiscation should be made subject to the pledge of the goods to the appellants, or in other words, that what should be condemned is the whole right and interest of the enemy subject, *videlicet*, his right to redeem the goods from the appellants on repayment of their advances.

(6) Because goods shipped before the outbreak of war on a British ship consigned to British subjects and carried to a British port are not lawful prize or are not liable to seizure as prize after they have arrived in port or been discharged and warehoused by or on behalf of the consignees.

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In the *Odessa*, the respondent, the Procurator-General, in his Case submitted that the appeal should be dismissed for the following reasons :

(1) Because the appellants were not the owners of the said nitrate of soda.

(2) Because the said nitrate of soda was the property of an enemy.

(3) Because the appellants were interested in the nitrate of soda as pledgees only and not as owners.

(4) Because in matters of prize liability to condemnation depends upon legal ownership.

(5) Because the contention of the appellants involves the seizure and condemnation as prize of war of British allied or neutral ships and cargoes to the extent to which an enemy has any charge over them by way of mortgage, pledge, or otherwise.

(6) Because it is a well-established principle of Prize law that the claims of pledgees of enemy-owned goods should be disregarded, and the alternative of recognizing such claims involves an inquiry and adjudication as to the extent of outstanding advances of every kind secured upon the goods.



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A similar submission was made by the Procurator-General in the case of the *Woolston*.

Sir ROBERT FINLAY, K.C., M.P., for the appellants, said that the question raised was one of great importance as regarded the rights of English bankers who had made advances in respect of the purchase money of goods as against bills of lading made out to them, the goods being endorsed on the bills as being deliverable to them or to their order. He submitted that the beneficial interest in these cargoes was in the appellants, the British subjects, because there was no doubt that they had, on the faith of their being consignees of the bills of lading, accepted and paid drafts to a very large amount. The President, following his decisions in the *Marie Glaeser*\* and the *Miramichi*,† had condemned the cargoes without saving the interest of Messrs. Schröder, in deference, he supposed, to the rule of the leading Prize Court cases that charges or liens should not be regarded. That there was such a rule where the lien did not appear on the face of the papers could not be disputed, but in a good many cases where the rule had been exercised it was because it was impossible to get to the bottom of the lien that was claimed, and liens of such a kind were not allowed to defeat the claim of the Crown. Such a rule had no application to a case like the present, where bankers had accepted and paid bills of exchange on the security of the cargoes, and their names appeared on the face of the bills of lading as the owners of the goods. He contended that Messrs. Schröder had full power over and disposition of these goods, and that, with possession of the bills of lading, they had what was equivalent to delivery and possession. With regard to the position of the appellants as holders of the bills of lading, he cited :

\* (1914). ante. Vol. I., page 56.

† (1914). ante. Vol. I., page 157.

*E. Clemens Horst v. Biddell* (1912), A.C. 18.

*Sewell v. Burdick* (1884), 10 App. Cas. 74.

*Bristol and West of England Bank v. Midland Railway Company* (1891), 2 Q.B. 653.

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On the very face of the ship's papers, the captors could see that they were the persons mentioned in the bills of lading as the consignees. There was nothing concealed. The objection sustained in the earlier prize cases against recognition of liens, charges or mortgages dependent upon private arrangements, which were not apparent on the ship's papers or not brought to the knowledge of the captors, was inapplicable to such a case as this.

Sir Robert Finlay then read the judgment of the President, and also the decisions in the cases of the *Marie Glaeser* and the *Miramichi*.

In illustration of his contention he quoted the following cases :

The *Tobago* (1804), 5 Ch. Rob. 218 ; 1 E.P.C. 456.

The *Marianna* (1805), 6 Ch. Rob. 24 ; 1 E.P.C. 518.

The *Belvidere* (1813), 1 Dods. 353 ; 2 E.P.C. 183.

The *Constantia Harlessen* (1810), Edw. 232.

The *Frances* (1814), 8 Cranch, 418.

The *Aina* (No. 1) (1854), Spinks, 8 ; 2 E.P.C. 247.

The *Ida* (1854), Spinks, 26 ; 2 E.P.C. 268.

The *Abo* (1854), Spinks, 42 ; 2 E.P.C. 285.

The *Ariel* (1857), 11 Moo. P.C. 119 ; 2 E.P.C. 600.

Sir ROBERT FINLAY, proceeding with his argument, referred to the decision in the case of the *Amy Warwick*,\* which arose at the time of the American Civil War.

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Lord PARKER : That was a case in which the interest of the enemy was a beneficial interest only.

Lord MERSEY : It appears to me that the Judge came to

\* (1862), 2 Sprague, 150, 160.



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the conclusion that the shippers in that case, whomever they bought the goods for, bought them and in that way acquired them. In other words, they had not a charge at all, but the whole property was in themselves.

Sir ROBERT FINLAY then cited the case of the *Hampton*,\* which he distinguished as being a case of a mortgage on a ship. Then there was the case of the *Carlos F. Roses*,† a Spanish vessel taken by the United States. The judgment of the majority in the Supreme Court of the United States in that case was not, of course, binding in this country, although entitled to respect as throwing some light upon the law. It was for their Lordships to decide whether the judgment of the minority of the judges in that case was not correct. He submitted that it was. Reference had been made to the question of policy. If the judgment were affirmed, what would be the effect on the transaction of financial business in London ? It would be confiscating property, the whole beneficial interest of which was in a British subject, while doing no damage to the enemy.

Lord MERSEY : These observations, Sir Robert, seem to proceed on the supposition that there is no real remedy for the bankers against the enemy. If the banker has his remedy, your observations do not appear to be well founded.

Sir ROBERT FINLAY : It is not to be supposed that any demand would be paid at once.

Lord MERSEY : No one suggests that the remedy is lost.

Sir ROBERT FINLAY : Well, it is suspended during the war.

\* (1866), 5 Wallace, 372.

† (1900), 177 U.S. Reports, 655.

LORD MERSEY : Nobody says that the remedy is not suspended. But it is not lost.

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SIR ROBERT FINLAY : In the case of the second ship, the *Woolston*, involved in this appeal, Messrs. Schröder might have ordered that the vessel should have been taken to the Mediterranean to discharge the nitrate, which might have found its way to Germany. I believe it is of the greatest possible value in the manufacture of explosives. Messrs. Schröder thought it proper to order the vessel to an English port, and the reward for their loyalty is that the Crown claims to confiscate the whole of this nitrate.

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LORD SUMNER : That may be an appeal to us *ad misericordiam*.

SIR ROBERT FINLAY : No, it is an appeal to justice.

LORD SUMNER : If it is laid down that the bankers can always get possession of the goods, it will operate as a perpetual handicap of those countries which go to war as against the bankers of those countries which do not. It would be contrary to national interests if the rule was laid down that the neutral bankers could always claim the goods by virtue of their having security.

LORD MERSEY : I suppose that bankers advanced money against bills of lading in the days of Lord Stowell ?

SIR ROBERT FINLAY : Undoubtedly they did, but the business has grown immensely during more recent times. Therefore, it is a very serious consideration that the whole of such business should be subject to annihilation in the event of war.

LORD MERSEY : Your object is to secure an advantage to this country at the expense of the enemy. If you can satisfy me that if we do not reverse the present judgment we shall be doing the enemy an advantage and not benefiting ourselves, your argument will appeal to me.



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Sir ROBERT FINLAY said that, of course, the Crown, to a certain extent, would be benefited at the expense of its own subjects.

Lord SUMNER : There is a possible remedy in the case of a belligerent Sovereign laying hands on the money of his subjects.

Sir ROBERT FINLAY : Only by Act of Parliament.

Lord SUMNER : It can be done out of the Privy Purse.

Mr. F. D. MACKINNON, K.C., followed on the same side. He said all the bankers in the City were concerned in this case. It was difficult to estimate the vast amount of money which was involved in the decision regarding the *Odessa*. When they realized the challenge it offered to the sacredness of the bill of lading the feelings of the bankers and all concerned were those of consternation.

The question had been raised in the Prize Court whether any injustice might be remedied by the bounty of the Crown, but he wished to point out that the Privy Council would be laying down a principle which would be quoted in future wars by Prize Courts, when we would be neutrals. If the law laid down was an unjust one, with remedy by the bounty of the Crown, it might be applied by other Prize Courts, where there was no bounty of the Crown, against us as neutrals.

Mr. MAURICE HILL, K.C., for the Crown, said that the ownership of the goods had always been accepted in the Prize Court as the test. In Prize no contractual liens were recognized. For this there was an unbroken line of authority in cases during the French wars, the Crimean war, the American Civil war, the Franco-German war, the Spanish-American war, the Russian-Japanese war, and the present war. It made no difference that the pledgee was named as consignee in the bill of lading. The

*Marianna*,\* the *Frances*,† the *Ida*‡ and the *Carlos F. Roses*§ were directly in point; and the *Amy Warwick*¶ was distinguishable, as the legal property in the goods was in the claimants. In addition to the cases cited by the appellants he also referred to :

The *Mary* (1815), 9 Cranch, 126.

The *Battle* (1867), 6 Wallace, 498.

*Der Turner*, cited in the *Marie Glaeser* (1914), ante, Vol. I., at p. 125.

The *Nigretia* (1904), 2 *Russian and Japanese Prize Cases*, 208.

The *Rossia* (1904), *ibid.*, 43.

*Pratt's Story*, p. 52.

The contention of the appellants involved the seizure and condemnation as prizes of war of British, allied or neutral ships and cargoes to the extent to which an enemy had any charge over them by way of mortgage, pledge, or otherwise.

Mr. HILL, continuing his argument, discussed, at the request of their Lordships, the relation of the distribution of prize money and the bounty of the Crown. He quoted from Rothery's *Prize Droits*. During the Crimean war Mr. Rothery, Registrar of the Admiralty Court, was invited to frame a report as to what was the practice during the last war as to the distribution of prize money in general. As a result, this volume had been compiled.

Originally all prize was in the Crown, and nobody could have a right to prize except under a grant from the Crown. Formerly the King granted to the Lord High Admiral certain classes of prize, and these were known as droits of Admiralty. In 1702 the office of Lord High Admiral had ceased; his rights were resumed by the King. Henceforward all prize has been in the King, either as

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\* (1805), 6 Ch. Rob. 24; 1 E.P.C. 518. † (1814), 8 Cranch, 418.

‡ (1854), Spinks. 26; 2 E.P.C. 268. § (1900), 177 U.S. Reports. 655.

¶ (1862), 2 Sprague, 150.



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droits of the Crown or as droits of Admiralty; and no one has had any right to prize except under a grant from the Crown. In respect of droits of the Crown, it was the practice to grant to commissioned captors the proceeds of prizes they should capture.

Lord MERSEY : Yes, and that was a right given to the captors which, of course, the Crown might cancel ?

Mr. HILL : Yes, my Lord, and it was given in each war only for that war. By the Civil List Act, 1831, 1 Will. IV., c. 25, s. 2, droits of Admiralty and droits of the Crown were directed to be carried to the Consolidated Fund, and after the decease of His Majesty to be paid to his Heirs and Successors.

He then referred to the Civil List Act, 1837, 1 & 2 Vict., c. 2; the Civil List Act, 1901, 1 Edw. VII., c. 4; the Civil List Act, 1910, 10 Edw. VII. & 1 Geo. V., c. 28.

Lord MERSEY : Has the Crown still the power of granting a concession of relief in cases of hardship ?

Lord PARKER : In Victoria's reign it had; in Edward's reign it had; and now we have to see whether it has in the reign of King George V.

Lord SUMNER : Representing the Crown, Mr. Hill, and not speaking with the fuller knowledge of the Law Officers of the Crown, you submit two things : First, that the point does not arise; secondly, if it does arise, that full power has been preserved to the Crown. You do not invite us to decide anything, but if we do decide anything you urge us to decide that ?

Mr. HILL : Yes, my Lord.

Lord MERSEY : I think, Mr. Maurice Hill, this point may be all-important. It is therefore desirable that the Attorney-General should be here to answer the points that arise.

Mr. HILL : I understood that the Attorney-General was to be here to-day, but I now learn that he is indisposed and cannot be present.

Some discussion took place with regard to the Prize Claims Committee's powers and work, and Lord MERSEY remarked that it was now fairly clear that by some process cases of hardship could be rectified in the same way as they were in the days of Lord Stowell.

Mr. HILL pointed out that if any relief were given by the bounty of the Crown it could be done in such a way that the liabilities of the enemy would not be discharged, and the pledgee would preserve and be bound to enforce for the benefit of the Crown all his existing rights against the pledgor.

Mr. MACKINNON, in reply, said that in substance the appellants had such a form of property in these goods as Lord Esher might have described as a special property. This special property of the pledgees was sufficient to justify their claim to have their lien on these goods for their advance released.

The ATTORNEY-GENERAL (*Sir Edward Carson, K.C., M.P.*) said he understood that their Lordships desired to hear him in the case of the *Odessa* on the question whether the Crown as owner of the droits of Admiralty had certain powers. He understood that Mr. Hill had called their Lordships' attention to the various Acts of Parliament dealing with these droits of Admiralty, commencing with the Civil List Act, 1837, 1 & 2 Vict., c. 2.

Lord MERSEY : Section 12 of that Act gives to the Crown the right to compensate a certain class of people.

The ATTORNEY-GENERAL : Yes, my Lord.

Lord MERSEY : I do not myself clearly understand what the effect will be if we do rule in this case that bounty is

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still in the Crown. I am thinking of the Claims Committee.

The ATTORNEY-GENERAL : I do not know whether there are real parties represented in this case so as to make a judicial decision binding.

Lord PARKER : The Victoria Civil List is repealed.

The ATTORNEY-GENERAL submitted that when droits of the Crown and of Admiralty went into the Consolidated Fund under Section 12 of the Civil List Act, 1837, exception was made only of the right of the Crown to extend its bounty to actual captors. It looked as though the right to benefit anybody else was gone.

Lord MERSEY : Subsequent draftsmanship appears to have put back what was lacking there. Nothing in this Act, said each of the later Civil List Acts, shall affect the rights of the Crown for the time being.\* The question was, what were those rights ?

The ATTORNEY-GENERAL : That phrase, my Lord, must be read in conjunction with Section 12 of the Act of 1 & 2 Vict.

Lord MERSEY : It is by no means certain that the power of the Crown to exercise its bounty in prize was ever done away with.

The Court was then cleared. On the return of the parties to the Court,

Lord MERSEY said : We see no reason to advise His Majesty to interfere with the decision of the President of the Prize Court in the *Odessa*.

As to the *Woolston*, we reserve our decision on the ground that a point affecting it is being argued in the case

\* " Nothing in this Act shall affect any rights or powers for the time being exerciseable with respect of any of the hereditary revenues which are by this Act directed to be paid into the Exchequer." 1 Edw. VII., c. 4, s. 9 (2); 10 Edw. VII. & 1 Geo. V., c. 28, s. 9 (2).

of the *Roumanian*. We will give our reasons later on, but meanwhile we may say that we are of opinion that the Crown's prerogative to redress injustice by the exercise of its bounty is not affected by any Civil List Act. We will say nothing about costs.

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## JUDGMENT OF THE JUDICIAL COMMITTEE DELIVERED BY LORD MERSEY.

These are appeals from two judgments of the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice sitting in Prize.

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There is very much in common in the points arising in both cases, but as the facts and arguments are not identical it is desirable to consider each case separately.

### THE CARGO *EX* " ODESSA."

The facts in this case are as follows: The appellants, Messrs. J. H. Schröder & Co., are bankers carrying on business in London. The partners are Baron Bruno von Schröder, a naturalized British subject, and Frank Tiarks, a natural born British subject. In the ordinary course of their business, the appellants had in March, 1914, agreed with a German company in Hamburg, called the *Rhederei Actien Gesellschaft von 1896*, to accept the drafts of Weber & Co., a firm carrying on its business in Chile, for the price of a quantity of nitrate of soda to be sold and shipped by Weber & Co. to the German company.

The drafts were to be drawn at 90 days' sight, and the appellants, upon acceptance of them, were to receive by way of security the bill of lading for the cargo, together



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with a policy of marine insurance. The consideration for this accommodation was to be a commission of one quarter per cent., payable by the German company to the appellants. In due course Weber & Co. shipped a cargo of nitrate on board a sailing ship called the *Odessa*, belonging to the German company, and took from the captain a bill of lading dated May 8, 1914, in which the voyage was described as from Mejillones (the port of shipment in Chile) to the " Channel for orders," and by which the cargo was made deliverable to the appellants or their assigns. This bill of lading incorporated the terms of a charter-party (of which there is no copy), and made the chartered freight payable by the consignees upon delivery of the cargo. Drafts for a total amount of £41,153 1s. 5d. (said to be the full price of the cargo) were drawn by Weber & Co. upon the appellants, and accepted by them on June 9, 1914, they receiving in exchange the bill of lading. War broke out between Great Britain and Germany on August 4, 1914, the *Odessa* being then on her voyage to the Channel. On the 19th the ship was captured on the high seas by H.M.S. *Caronia*, and brought into Bantry Bay, and on the 31st a writ was issued against ship and cargo at the suit of the Procurator-General claiming condemnation of both as lawful prize. On September 10 the drafts of Weber & Co. fell due, and were paid by the appellants. The ship was duly condemned, and no question arises with reference to her condemnation, but in respect of the cargo the appellants intervened, and by their claim alleged it to be their property as holders for full value of the bill of lading therefor and as British property not liable to condemnation. The case was heard by the learned President on December 7 and 14, 1914, with the result that he condemned the cargo on the ground that the general property was in the German company at the date of the seizure, and that the appellants were merely

pledgees, and as such not entitled to any precedence over the Crown.

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Their Lordships are of opinion that the learned President was right in the inferences which he drew from the facts, namely, that the general property in the cargo was in the German company, and that the appellants were merely pledgees thereof at the date of the seizure. This indeed is hardly disputable, having regard to the case of *Sewell v. Burdick*.<sup>\*</sup> The property vested in the company upon the ascertainment of the goods at Mejillones, and the pledge was perfected when the appellants accepted the drafts and received the bill of lading.

The appellants indeed did not dispute the correctness of these inferences, but what they say is that, though correct, they do not justify a decree which has the effect of forfeiting their rights as pledgees. Thus the question in the appeal is whether in case of a pledge such as existed here a Court of Prize ought to condemn the cargo, and, if so, whether it should direct the appellants' claim to be paid out of the proceeds to arise from the sale thereof.

It is worth while to recall generally the principles which have hitherto guided British Courts of Prize in dealing with a claim by a captor for condemnation. All civilized nations up to the present time have recognized the right of a belligerent to seize with a view to condemnation by a competent Court of Prize enemy ships found on the high seas or in the belligerents' territorial waters and enemy cargoes. But such seizure does not, according to British Prize Law, affect the ownership of the thing seized. Before that can happen the thing seized, be it ship or goods, must be brought into the possession of a lawfully constituted Court of Prize, and the captor must then ask for and obtain its condemnation as prize. The suit may be initiated by the representative of the capturing State, in

<sup>\*</sup> (1884). 10 App. Cas. 74.



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this country by the Procurator-General. It is a suit *in rem*, and the function of the Court is to inquire into the national character of the thing seized. If it is found to be of enemy character the duty of the Court is to condemn it; if not, then to restore it to those entitled to its possession. The question of national character is made to depend upon the ownership at the date of seizure, and is to be determined by evidence. The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure, and to transfer it as from that date to the Sovereign or to his grantees. The thing—the *res*—is then *his* for him to deal with as he thinks fit, and the proceeding is at an end.

As the right to seize is universally recognized, so also is the title which the judgment of the Court creates. The judgment is of international force, and it is because of this circumstance that Courts of Prize have always been guided by general principles of law capable of universal acceptance rather than by considerations of special rules of municipal law. Thus it has come about that in determining the national character of the thing seized, the Courts in this country have taken ownership as the criterion, meaning by ownership the property or *dominium* as opposed to any special rights created by contracts or dealings between individuals, without considering whether these special rights are or are not, according to the municipal law applicable to the case, proprietary rights or otherwise. The rule by which ownership is taken as the criterion is not a mere rule of practice or convenience; it is not a rule of thumb. It lays down a test capable of universal application, and therefore peculiarly appropriate to questions with which a Court of Prize has to deal. It is a rule not complicated by considerations of the effect of the numerous interests which under different systems of jurisprudence may be acquired by individuals either in or

in relation to chattels. All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned. If in each case the Court of Prize had to investigate the municipal law of a foreign country in order to ascertain the various rights and interests of everyone who might claim to be directly or indirectly interested in the vessel or goods seized, and if in addition it had to investigate the particular facts of each case (as to which it would have few, if any, means of learning the truth), the Court would be subject to a burthen which it could not well discharge.

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There is a further reason for the adoption of the rule. If special rights of property created by the enemy owner were recognized in a Court of Prize, it would be easy for such owner to protect his own interests upon shipment of the goods to or from the ports of his own country. He might, for example, in every case borrow on the security of the goods an amount approximating to their value from a neutral lender and create in favour of such lender a charge or lien or mortgage on the goods in question. He would thus stand to lose nothing in the transaction, for the proceeds of the goods, if captured, would, if recovered by the lender, have to be applied by him in discharge of his debt. Again, if a neutral pledgee were allowed to use the Prize Court as a means of obtaining payment of his debt instead of being left to recover it in the enemy's Courts, the door would be open to the enemy for obtaining fresh banking credit for his trade, to the great injury of the captor belligerent.

Acting upon the principle of this rule, Courts of Prize in this country have from before the days of Lord Stowell refused to recognize or give effect to any right in the nature of a " special " property or interest or any mortgage or contractual lien created by the enemy whose vessel or goods have been seized. Liens arising otherwise than by



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contract stand on a different footing and involve different considerations; but even as to these it is doubtful whether the Court will give effect to them. Where the goods have been increased in value by the services which give rise to the possessory lien, it appears to have been the practice of the Court to make an equitable allowance to the national or neutral lien holder in respect of such services. In the judgment in the *Frances*,\* speaking of freight, it is said :

On the one hand, the captor, by stepping into the shoes of the enemy owner of the goods, is personally benefited by the labour of a friend, and ought, in justice, to make him the proper compensation; and on the other, the shipowner, by not having carried the goods to the place of their destination, and this in consequence of the act of the captor, would be totally without remedy to recover his freight against the owner of the goods.

It is, however, unnecessary to deal with the question of liens arising apart from contract, the present case being one of pledge founded on a contract made with the enemy.

When the authorities are examined it will be found that they bear out the view that enemy ownership is the true criterion of the liability to condemnation. The case of the *Tobago*† is in point. There the claimant was a British subject. In time of peace he had honestly advanced money to a French shipowner to enable the latter to repair his ship which was disabled, and by way of security he had taken from the owner a bottomry bond. Afterwards war broke out with France and the vessel was captured. In the proceedings in the Prize Court for condemnation, the holder of the bottomry bond asked that his security might be protected, but Lord Stowell (then Sir William Scott), after observing that the contract of bottomry was one which the Admiralty Court

\* (1814), 8 Cranch, 419.

† (1804), 5 Ch. Rob., 218; 1 E.P.C. 456.

regarded with great attention and tenderness, went on to ask :

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But can the Court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment, and demand restitution of such interests in a Court of Prize ?

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And he states that it had never been the practice to do so. He points out that a bottomry bond works no change of property in the vessel, and says :

If there is no change of property, there can be no change of national character. Those lending money on such security, take this security subject to all the chances incident to it, and, amongst the rest, the chances of war.

The decision in the *Mary*\* is to the same effect. Similarly in the *Aina*† the Court refused to recognize or give effect to a mortgage on the ship captured, and the same point arose and was similarly decided in the *Hampton*.‡ Again, in the *Battle*§, the Court refused to recognise a maritime lien for necessaries, a decision which was followed in the *Rossia*.¶ The *Ariel*|| was the converse case of an attempt to obtain condemnation not of enemy goods but an enemy lien on goods ; it failed on the same principle. In that case Sir John Patteson said :

Liens, whether in favour of a neutral on an enemy's ship, or in favour of an enemy on a neutral ship, are equally to be disregarded in a Court of Prize.

All these cases were fully discussed by the President in the *Marie Glaeser*.\*\*

Passing to cases which in their circumstances more

\* (1815), 9 Cranch, 126, at page 147.

† (1854), Spinks, 8 ; 2 E.P.C. 247.

‡ (1866), 5 Wallace, 372.

§ (1867), 6 Wallace, 498.

¶ (1904), 2 *Russian and Japanese Prize Cases*, 43.

|| (1857), 11 Moo. P.C. 119 ; 2 E.P.C. 600.

\*\* (1914), ante, Vol. I., page 56.



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resemble the present case, there is the *Marianna*,\* in which the Court refused to give effect to a contract of pledge on goods consigned to the agent of the pledgee.

" Captors," says Sir W. Scott in that case,

. . . are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. . . . The doctrine of liens depends very much on the particular rules of jurisprudence, which prevail in different countries. To decide judicially on such claims would require of the Court a perfect knowledge of the Law of Covenant, and the application of that law in all Countries under all the diversities in which that law exists. From necessity, therefore, the Court would be obliged to shut the door against such discussions, and to decide on the simple title of property, with scarcely any exceptions.

There is the *Frances*,† in which the Court refused to recognize or give effect to the rights of a consignee under the bill of lading for advances against the goods to which the bill of lading related. In that case the Court laid it down that—

. . . in cases of liens created by the mere private contract of individuals, depending upon the different laws of different Countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts.

There is another American case, the *Carlos F. Roses*,‡ in which the claim put forward by a neutral who had advanced money upon a cargo on a captured ship and who had received bills of lading covering the shipment, was rejected.

\* (1805), 6 Ch. Rob. 24; 1 E.P.C. 518.

† (1814), 8 Cranch, 418.

‡ (1900), 177. U.S. Reports, 655.

It is difficult to distinguish the facts in any of the three cases last mentioned from the facts of the present claim by Messrs. Schröder & Co. Some stress was laid by the appellants upon the dissenting judgments in the *Carlos F. Roses*, but a perusal of these judgments will show that they proceeded upon the assumption that in the circumstances the general property in the goods had passed to the holder of the bills of lading. The case was decided before the judgment in *Sewell v. Burdick*.\* Finally the *Hampton*† is a case in which the claim of a mortgagee on a ship was rejected.

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Before adverting to the arguments by which the appellants seek to displace this weight of authority, it is necessary to deal with a contention put forward by them to the effect that by their title as pledgees they are clothed with a sufficient ownership to bring their case within the rule. This contention is based upon the right of sale accorded to a pledgee by the law of England, by which, in the event of default by the pledgor in payment of his debt, the pledgee can sell the pledge without first having recourse to a court of law for authority to do so. This right, it is said, creates a "special" property in the pledge in favour of the pledgee, and is a right *in re* constituting or equivalent to ownership and distinguishable in character from the mere right *in rem* possessed by a lien holder. It is first to be observed of this right to sell without recourse to a court of law that it is peculiar to the English law of pledge. It is thus precisely one of those matters which a Prize Court should leave out of consideration when applying to its decision general principles common to all systems of law to the exclusion of principles of municipal law.

The subject was very fully examined by Chancellor Kent in Lord Stowell's time in 1805, in a learned judgment declaring the decision of the Supreme Court of the State

\* (1884), 10 App. Cas. 74.

† (1866), 5 Wallace, 372.



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of New York (*Cortelyou v. Lansing* (1805), 2 Cairnes' Cases in Error, p. 202) :

I believe (he says) that there is no country at present, unless it be England, that allows a pledge to be sold but in pursuance of a judicial sentence.

And secondly it is to be observed that if the right clothes the pledgees with ownership it precludes the Court from making any decree at all of condemnation.

The ownership by which a Court of Prize is guided cannot subsist both in the pledgees and in the pledgors.

If it exists in the appellants in the present case, no decree can be made against them, for they are British subjects, and the interest left in the enemy subject cannot be condemned, for *ex hypothesi* it is not an interest which includes ownership. (See the *Ariel*,\* in which it was laid down that as a Court of Prize ignores a lien in favour of a neutral on an enemy's ship, so will it ignore a lien in favour of an enemy on a neutral ship.)

But when the nature of the right of a pledgee to sell is examined, it will be seen that the so-called " special " property which it is said to create is in truth no property at all. This has been recognized by many judges who have used the expression " special interest " as a substitute for " special property." (See *Mores v. Conham*† and *Donald v. Suckling*.‡)

If it were not for the somewhat unfortunate peculiarity of English terminology involved in the established use of the words " special property " when " special interest " would seem better, it is difficult to see how an argument could be maintained which would effectively distinguish pledge from lien for present purposes.

The very expression " special property " seems to exclude the notion of that general property which is the

\* (1857), 11 Moo. P.C. 119 ; 2 E.P.C. 600.

† (1610), Owen, 123.

‡ (1868). L.R. 1 Q.B. 585. at page 613.

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badge of ownership. If the pledgee sells, he does so by virtue and to the extent of the pledgor's ownership, and not with a new title of his own. He must appropriate the proceeds of the sale to the payment of the pledgor's debt, for the money resulting from the sale is the pledgor's money to be so applied. The pledgee must account to the pledgor for any surplus after paying the debt. He must take care that the sale is a provident sale, and if the goods are in bulk he must not sell more than is reasonably sufficient to pay off the debt, for he only holds possession for the purpose of securing himself the advance which he has made. He cannot use the goods as his own. These considerations show that the right of sale is exerciseable by virtue of an implied authority from the pledgor and for the benefit of both parties. It creates no *jus in re* in favour of the pledgee; it gives him no more than a *jus in rem* such as a lien holder possesses, but with this added incident, that he can sell the property *motu proprio* and without any assistance from the Court.

Returning to the authorities, the appellants attempt to displace them in the following way. They say, in the first place, that Lord Stowell in the *Tobago*\* was referring only to "secret" liens which they interpret to mean liens not appearing on the ship's papers, and they contend that theirs was not secret, for that it appears on the ship's papers, namely, on the face of the bills of lading. But when the judgment in the *Tobago* is examined it will be found that Lord Stowell used the term "secret liens" as equivalent to liens created by the act of the parties as opposed to those arising under the general law merchant. Further, it cannot in the present case be said with any truth that Messrs. Schröder's lien is disclosed on the ship's papers. It is true that the bill of lading was made out in favour of them or their assigns, but this is quite consistent

\* (1804), 5 Ch. Rob. 218; 1 E.P.C. 456.



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with their having no charge at all, and the consignment having been made to them merely as the factors or agents of the enemy owner. The contract of pledge under which alone their claim arises, however probable in the ordinary course of commerce, is nowhere disclosed in the ship's papers. Again, such as it was, the disclosure was certainly no more than existed in the cases of the *Marianna*,\* the *Frances*,† and the *Carlos F. Roses*.‡

Secondly, the appellants contend that being by virtue of the bill of lading in possession of the goods in question there can be no reason in principle why the Court should not recognize an interest arising out of such possession just as it recognizes the carrier's possessory lien for freight. But such possession as the appellants had is not an actual possession such as forms the basis of a possessory lien at common law, but merely such possession as according to the law relating to pledge arises out of constructive or symbolical delivery. There is not, to use the words of Lord Stowell in the *Tobago*,§ that "interest directly and visibly residing in the substance of the thing itself" which is to be found in the actual possession held by a carrier. Further, it will be found that a possession, similar in character to that which Messrs. Schröder had, existed in several of the cases already referred to on the part of lien holders whose claims were rejected by the Court.

Thirdly, the Court was asked to accept the suggestion that the practice of making advances on the security of bills of lading had arisen after the decisions referred to had been pronounced, and that in the interest of commerce the adverse decisions should now be disregarded. With regard to this argument it is to be observed that at any rate the *Carlos F. Roses* was decided at a time when the

\* (1805), 6 Ch. Rob. 24; 1 E.P.C. 518.

† (1814), 8 Cranch, 418. ‡ (1900), 177 U.S. Reports, 655.

§ (1804), 5 Ch. Rob. 218; 1 E.P.C. 456.

practice referred to was well known, and although the decision cannot bind an English Court, still the considered judgment of the Supreme Court of the United States is entitled to the greatest possible weight. Further, it is difficult to see how any change—if there has been any change—in commercial practice invalidates the reasons which led to the decisions in question.

~ Lastly, the appellants urged that if the Court now applies the principles illustrated by the cases above referred to, very serious injustice will be done to, and serious loss incurred by, neutrals or subjects who, before the commencement of the war and in the normal course of business, have made advances against bills of lading. It is to be observed that similar injustice and loss, though possibly on a less extensive scale, must have been occasioned by the application of the same rules in the 18th and early 19th centuries, and similar arguments were in fact addressed to Lord Stowell as a reason why they should not be applied in individual cases. The reason why such arguments cannot be sustained is fairly obvious. War must in its very nature work hardship to individuals, and in laying down rules to be applied internationally to circumstances arising out of a state of war, it would be impossible to avoid it. All that can be done is to lay down rules which, if applied generally by civilized nations, will, without interfering with the belligerent right of capture, avoid as far as may be any loss to innocent parties. It is precisely because the recognition of liens or other rights arising out of private contracts would so seriously interfere with the belligerent right of capture that the Courts have refused to recognize such liens or rights in spite of the hardship which might be occasioned to individuals from such want of recognition. It is said that in Lord Stowell's time there was a possibility of redressing any individual hardship which might be caused to neutral or

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subject by an appeal to the bounty of the Crown, and that in some way or other the Crown has lost its power of bounty in the matter. It is true that Lord Stowell, when pressed with the individual hardship of decisions he was about to pronounce, sometimes referred to the fact that any apparent injustice might be met by an exercise of the Crown's bounty. (See the *Belvidere*,\* and the *Constantia Harlessen*.†)

Whether his judgments were in any way based on that consideration or whether they would not have been the same if the possibility of the exercise of the Crown's bounty had not existed is an arguable point.

In their Lordships' opinion, however, it is unnecessary to decide this point. for after hearing the Attorney-General they have come to the conclusion not only that the Crown had and was accustomed to exercise a power of bounty by way of redress of hardships, but that such power still exists unimpaired.

Perhaps the most notable instance of the exercise of such power was the Order in Council made at the commencement of the war with Denmark in 1807. It was thereby ordered that in case any advances should have been made before the then late embargo (viz., September 2 then last passed) by any British subject upon the credit and security of any ship, freight, or goods belonging to Danish subjects which might be condemned as prize to His Majesty, the amount of such advances so actually made (but without further compensation) should be paid to the British subjects out of the proceeds of the property so condemned upon the credit of which the advances were respectively made upon due proof thereof to the satisfaction of the High Court of Admiralty.

If the Crown could order this generally, it must also have had the power to order it in particular instances.

\* (1813), 1 Dods. 353; 2 F.P.C. 183.

† (1810), Edw. 232.

Further, if it could make such an order in favour of British subjects, it must also have had the power to make it in favour of neutrals, and circumstances can easily be imagined in which the exercise of such a power in favour of neutrals might as a matter of policy be deemed desirable.

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If the Crown had and was accustomed to exercise the power of redressing hardship by way of bounty, such right must still exist unless taken away by Act of Parliament, and it must be remembered that the Crown's Prerogative can only be abridged by express words or necessary implication. The argument of the Attorney-General to the effect that the power in question has ceased to exist is solely based on the effect to be given to the statutes which have been from time to time passed in reference to the Civil List. The first Civil List Act which affects Droits of Admiralty and Droits of the Crown is the Act of 1 Geo. IV., c. 1. By Section 2 of this Act the produce of certain Crown Revenues (which did not include Droits of Admiralty or Droits of the Crown or other small casual revenues) were for the life of King George IV. carried to the Consolidated Fund. It was provided that an account of all moneys to be received in respect of the casual revenues of the Crown, including Droits of Admiralty and Droits of the Crown and of the application thereof, should annually be laid before Parliament. By s. 2 of 1 Will. IV., c. 25, the casual revenues of the Crown, including Droits of Admiralty and Droits of the Crown, were treated in the same way as the other hereditary revenues and carried during the life of King William IV. to the Consolidated Fund, it being provided that all such revenues should after his death be payable to his Heirs and Successors. The 12th Section of this Act provides that nothing therein contained should impair or prejudice any rights or powers of control, management, or direction, relative to (*inter alia*) the



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granting of any Droits of Admiralty or any Droits of the Crown as a reward or remuneration to any officer or officers or other person or persons seizing or taking the same or giving any information relating thereto, it being the true intent and meaning of the Act that the said rights and powers should not in any degree be prejudiced in any manner, but only that the moneys accruing to the Crown after the full and free exercise and enjoyment of the said rights and powers should during His Majesty's life be carried to the Consolidated Fund. It was obviously the intention of this clause that the Crown's right of making grants out of Droits of Admiralty and Droits of the Crown in favour of captors or persons giving information leading to the capture should be preserved, but nothing being expressly said as to making grants in order to redress hardships, it is arguable that on the principle of *expressio unius est exclusio alterius* the Crown's right in this respect was intended to be taken away. Further, the same argument is open upon the construction of 1 & 2 Vict., c. 2, which in effect re-enacts the Act of 1 Will. IV., c. 25 during the reign of Queen Victoria. It is unnecessary actually to decide the point, and their Lordships will assume for the purpose of this case that during the reigns of King William IV. and Queen Victoria the right of the Crown in respect of Admiralty Droits and Droits of the Crown was confined to rewarding captors and persons giving information leading to the capture. It seems clear, however, that on the death of Queen Victoria her successor, King Edward VII., became entitled to Droits of Admiralty and Droits of the Crown to the same extent as if there had never been a surrender in favour of the Consolidated Fund. In other words, any restriction created during the lives of King William IV. and Queen Victoria ceased to apply. If, therefore, the ancient right of the Crown to dispose of these droits is now curtailed it must be by virtue of some

statute passed subsequently to the death of Queen Victoria. In other words, it must be by virtue of the Civil Lists Acts 1 Edw. VII., c. 4, and 1 Geo. V., c. 28.

By 1 Edw. VII., c. 4, s. 1, it is provided that the hereditary revenues which were by Section 2 of 1 & 2 Vict., c. 2, directed to be carried to and made part of the Consolidated Fund should, during the life of King Edward VII. and six months afterwards, be paid into the Exchequer and made part of the Consolidated Fund. By Section 9 (2) it is provided that nothing in the Act contained should affect any rights or powers for the time being exerciseable with respect to any of the hereditary revenues which were by the Act directed to be paid into the Exchequer, and by Sub-section 3 of the same section the 1 & 2 Vict., c. 2 was with immaterial exceptions repealed. The Act of 1 Geo. V., c. 28, re-enacts in the same terms the Act of 1 Edw. VII., c. 4, for the life of his present Majesty and six months afterwards.

The question therefore is as to the meaning and effect of the reservation contained in the two last-mentioned Acts of the rights and powers of the Crown for the time being exerciseable. It should be noticed in contrast to the Acts of 1 Will. IV., c. 25, and 1 & 2 Vict., c. 2, that the reservation is not specific but general in its terms. It should be noticed also that it is not a reservation of rights and powers which were or might have been exercised by some former Sovereign or Sovereigns (the form of reservation in some of the earlier Civil Lists Acts), but a reservation of rights and powers "for the time being" exerciseable. This must mean powers which have not at the date of their proposed exercise been taken away by Act of Parliament. To ascertain the nature of the rights and powers intended to be reserved it is permissible to consider the object for which the Acts themselves and the earlier Acts hereinbefore mentioned were passed.

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The object of each of these Acts is a surrender by the Crown of its hereditary revenues in consideration of a fixed grant from Parliament. Each Act has been intended to carry to the Consolidated Fund revenue which would otherwise have gone to the Sovereign, and not revenue which because of the exercise of some right or power in the Crown would never have gone to the Sovereign at all. This object was, in the Acts of George IV., William IV., and Victoria, sought to be attained by a specific enumeration of the rights reserved. In the Acts of Edward VII. and George V. it is sought to be attained by a general reservation of all rights. It could hardly be contended that the rights and powers expressly reserved in the earlier Acts are not included in the general reservation contained in the latter Acts. If such a contention were well founded, the Crown would have lost many rights, the existence of which is of great importance in the public interest. It would have lost, for instance, the right to make grants to the natural children of a bastard intestate or to reward captors or persons giving information leading to the capture of enemy goods. It is of equal importance in the public interest, and indeed of friendly relations with neutral Powers, that the Crown should retain the power of making in the interests either of British subjects or of neutrals such an Order in Council as was done at the outbreak of the Danish war in 1807. The only distinction is that no such power was expressly reserved in the earlier Civil List Acts. It is in their Lordships' opinion much more reasonable to suppose that the general words were used to cover such a case than to confine the words themselves, in spite of their generality, to rights and powers expressly reserved by the earlier Acts. If the words of reservation now in force are sufficient to cover a right of so important and useful a nature, it would, in their Lordships' opinion, be wrong to hold that it had been



destroyed merely because it had ceased to be exerciseable during the reigns of King William IV. and Queen Victoria. Their Lordships therefore hold that the power in question still exists. They desire, however, to state that they express no opinion as to whether the present case is one in which the power ought to be exercised.

There were two other points suggested in argument which deserve some consideration. First it was said that the difficulty of recognizing liens on captured enemy goods might be less in the case of a lien holder being a subject than in the case of his being a neutral. In the case of a neutral it is obvious that the payment of the lien out of the proceeds of a sale of the goods would enure directly to the benefit of the enemy. The enemy debt would thus be paid at the expense of the captors instead of the neutral being left to recover it in the enemy courts. A right of capture at sea would thus be deprived of its national advantage. On the other hand, if the lien holder be a subject his right of proceeding in the enemy courts is, if not lost, at any rate suspended by the existence of a state of war. If the right be lost the recognition of the lien would not, it is said, enure to the advantage of the alien enemy, but merely to one of His Majesty's subjects. If the right be merely suspended it could not enure to the advantage of the alien enemy, at any rate until after the war, and the Court, it is said, should only consider the existing state of war and not be guided by what will happen when the war is over. There may be some force in these considerations, but, on the other hand, it is to be remembered that by international comity the Courts of Prize in this country have, in general, extended to neutrals the same advantages as they afford to His Majesty's subjects, and it would be difficult to make an exception. Moreover, both in the case of a neutral and of a subject the lien holder may have in his hands assets belonging to

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the enemy to which he can have recourse for the payment of his debt; and into such a matter the courts have no means of inquiring.

The second suggestion does not involve the same difficulty. It is that the rules laid down in the cases referred to should be confined to transactions originating during the war, and that liens created *bona fide* before the war began might well be recognized whether held by subjects or neutrals. There is, however, no authority for such a distinction; indeed, authority is the other way. (See the *Tobago*.\*)

Neither of the above suggestions was seriously pressed on their Lordships, nor could either of them be accepted.

For the foregoing reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed.

### THE CARGO *EX* "WOOLSTON."

The above judgment in the case of the cargo *ex Odessa* applies equally in the case of the cargo *ex Woolston*. The only difference between the two cases is that the *Odessa* was an enemy ship, and the *Woolston* was a British ship. Their Lordships are of opinion that enemy goods on board British ships at the commencement of hostilities are the proper subject of maritime prize. The point has been more fully dealt with in the judgment in the case of the *Roumanian*.† The fact that the *Woolston* was a British ship can, therefore, have no importance unless it be necessary for the Court to act upon some presumption arising from the character of the ship. It is unnecessary to act on any such presumption,

\* (1805), 5 Ch. Rob. 218; 1 E.P.C. 456.

† (1915), ante, page 378.

where, as in the present case, the whole facts are in evidence and the enemy character of the cargo is fully established.

In this case, also, their Lordships will humbly advise His Majesty that the appeal should be dismissed.

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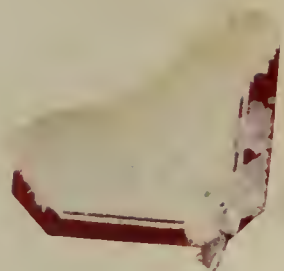
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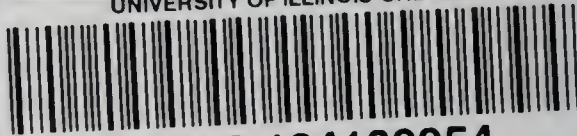








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